

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
KOLO, LLC,

Plaintiff,

v.

KATE'S PAPERIE, LTD.,

Defendant.

No.: 07-Civ.-10653 (CM)

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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DEFENDANT'S PROPOSED FINDINGS OF FACT

Kate's Paperie, Ltd. ("Kate's"), by and through its counsel, Kirkpatrick & Lockhart Preston Gates Ellis LLP, respectfully submits the following proposed findings of fact and conclusions of law regarding the motion of defendant Kolo, LLC ("Kolo") for a preliminary injunction enjoining Kate's from acting to remove the Kolo Shop-in-Shop from Kate's Spring Street store.

PROPOSED FINDINGS OF FACT

A. The Parties

1. Kate's is a New York corporation that specializes in selling stationery and paper products such as journals, gift wrap, photo albums and fine writing instruments. Kate's currently operates five stores in New York City and one in Greenwich, Connecticut.

2. Kolo is a Delaware LLC that specializes in wholesale and retail sales of photo albums and photo album accessories. Until recently, Kolo supplied goods to Kate's.

3. Mr. Lionel Flax is a son of the founder of Kate's. From April 2007 through November 2007, Lionel Flax was the "de facto" president of Kate's and acted on behalf of Kate's in connection with the Kolo shop-in-shop proposal and the Letter of Intent. See Witness Statement of Lionel Flax ("Flax Witness Statement"), at ¶¶ 3, 6.

4. Keith Werner ("Mr. Werner") is now the President of Kolo. During the period from April, 2007 through December 31, 2007, Mr. Werner was the Executive Vice President of Kolo. See Defendant's Exhibit Supplement to Proposed Findings of Fact and Conclusions of Law (hereafter "Def.'s Suppl."), Exhibit H (Werner Tr. at 6:5-7:9).

5. By March 2007, Kate's was experiencing financial difficulties. In an attempt to avoid bankruptcy, a Vendors Committee was formed of its creditors. Kolo was

represented on the Vendors Committee by Mr. Werner. Mr. Flax met Mr. Werner for the first time through the Vendors Committee. See Def.'s Suppl., Ex. A (Werner Tr. at 37:25-44:21); see also Flax Witness Statement, at ¶ 8.

B. The Shop-in-Shop Written Proposal

6. During March 2007, Kate's and Kolo discussed the idea of Kolo setting up a shop-in-shop at Kate's Spring Street store, and possibly in Kate's other Manhattan stores. See Def.'s Suppl., Ex. H (Werner Tr. at 46:8-13).

7. In April 2007, Kolo presented Kate's with a 9-page PowerPoint proposal for the shop-in-shop idea. The proposal focused on the Spring Street store as the initial location for launching the Shop-in-Shop. See Def.'s Suppl., Ex. A; Def.'s Suppl., Ex. H (Werner Tr. at 198:19-199:14).

8. Kolo's PowerPoint proposal consisted of three illustrations of the suggested floor plan for approximately 450 square feet of the Spring Street location; basic terms regarding lease options, Kate's termination rights, and Kolo payments; and projections of anticipated revenue. See Def.'s Suppl., Ex. A.

9. Immediately behind the floor diagrams, the proposal contains a page entitled "SOHO Proposal (Basic Terms)" that outlines the following:

- a lease term of one year, with 3 one-year renewal options;
- a "Right to Terminate:" Kate's could terminate the lease after the first year unless Kolo "continues to pay Kate's a minimum of \$140 Per Square Foot, plus 6% Royalty";
- Kolo would provide Kate's with monthly point-of-sale ("POS") data;
- Kolo would make "monthly" rental and "monthly" royalty payments, with the dollar amounts of each based on certain sales levels shown in the "Financial Proposal" page; and

- Kate's would obtain a landlord consent and non-disturbance agreement.

See Def.'s Suppl., Ex. A.

10. The following page, entitled "Financial Proposal," provides that Kolo will pay a "Starting Rent" of \$75 per square foot and a "Starting Royalty" of 6%. Royalty rate increases and rent increases are set forth for rising net sales levels. See Def.'s Suppl., Ex. A. The "Starting Royalty" line does not state that the obligation to pay royalty will not begin to accrue until Kolo's net sales reached any particular level.

C. The Letter of Intent

11. Prior to May 6, 2007, Mr. Werner and his attorney drafted a two-page letter of intent relating to the Shop-in-Shop proposal (the "LOI"). See Def.'s Suppl., Ex. H (Werner Tr. at 54:1-59:18; 121:11-122:12).

12. On May 6, 2007, Mr. Werner sent Mr. Flax the following e-mail text, in which Mr. Werner referred to the LOI as a "draft" and the PowerPoint document as a "proposal":

Sorry we were unable to talk again the other day. I will be arriving back to the US this weekend and plan to be at the creditors meeting on Monday, 5/7. Also, enclosed please find a draft of the letter of intent. Sorry for the delay as you can imagine my schedule has been extremely busy. Please review it and let me know if we are on the same page. The reference to the addendum is the proposal that I had originally sent you so if you have any question about it then you can refer to the original proposal. We are full steam ahead for getting everything ready for Spring in June. I will try calling you over the weekend. Maybe we can get together after the meeting on Monday.

Mr. Werner attached the LOI to this email. See Def.'s Suppl., Ex. C. There is only one version of the LOI, as neither party modified or edited its text after Mr. Werner sent it to Mr. Flax. See Id. at Ex. H (Werner Tr. at 85:7-89:21).

13. Mr. Flax did not show the LOI to anyone at Kate's because he did not think it was a formal document, but thought that the parties would nonetheless begin to implement the Shop-in-Shop idea. See Flax Witness Statement at ¶ 21.

14. Mr. Werner testified that he understood, even after he signed the agreement, that the parties would engage in further negotiations. See Def.'s Suppl., Ex. H (Werner Tr. at 121:11-123:124:25).

15. On May 8, 2007, Mr. Werner sent Mr. Flax an e-mail asking Mr. Flax whether he had signed the LOI. See Def.'s Suppl., Ex. D.

16. The same day, Mr. Flax responded: "I just sent this through signed." See Def.'s Suppl., Ex. D.

17. Mr. Werner testified that he remembers receiving at least the signature page of the LOI bearing Mr. Flax's signature. See Def.'s Suppl., Ex. H (Werner Tr. at 105:19-106:12).

18. Mr. Werner testified that he may have himself signed the LOI, but he was not certain. See Def.'s Suppl., Ex. H (Werner Tr. at 83:24-84:2; 112:8-113:12).

19. Mr. Werner did not discuss the specific wording or the terms of the LOI with Mr. Flax at any time prior to Mr. Flax reporting that he had signed it. See Def.'s Suppl., Ex. H (Werner Tr. at 85:7-89:21).

20. On Saturday, May 12, 2007, Mr. Werner sent Mr. Flax an e-mail saying that he had received the "faxed LOI" and that he would "bring a copy of the signed one" to a lunch meeting the following Tuesday, May 15. See Def.'s Suppl., Ex. G.

21. On Tuesday, May 15, Mr. Werner and Mr. Flax, along with others, met at the Mercer Café for lunch. Mr. Werner testified that he cannot recall whether he brought the

LOI to the lunch meeting. See Def.'s Suppl., Ex. A (Werner Tr. at 117:3-119:19). According to Mr. Flax, Mr. Werner did not bring the LOI to that meeting. See Flax Witness Statement, at ¶ 26.

22. Mr. Flax has no recollection, one way or the other, of having signed the draft LOI. See Flax Witness Statement, at ¶ 22.

23. Neither party has a signed copy of the LOI. See Def.'s Suppl., Ex. H (Werner Tr. at 119:3-120:18); see also Flax Witness Statement at ¶ 23.

24. The LOI was not modified by either party after Mr. Flax received it. See Def.'s Suppl., Ex. I (Flax Tr. at 94:8-95:9).

25. On or about June 1, 2007, Kolo set up a shop-in-shop at the Spring Street Store. See Def.'s Suppl., Ex. H (Werner Tr. at 216:21-217:16).

26. Mr. Flax testified that Kolo moved into the Spring Street space did not alter his expectation that the parties would continue to negotiate and execute a formal lease agreement, as contemplated by the LOI. See Def.'s Suppl., Ex. I (Flax Tr. at 86:8-22).

27. Mr. Werner testified that he does not remember what many of the terms in the LOI and in the PowerPoint proposal were intended to mean at the time that they were written. See Def.'s Suppl., Ex. H (Werner Tr. at 121:11-164:12).

D. Findings As To Interpretation Of The LOI

29. Addendum (A) of the LOI provides floor plans for the Spring Street location only. There is nothing in the LOI identifying floor plans or diagrams for any other store. See Def.'s Suppl., Ex. H (Werner Tr. at 139:14-141:11).

30. The page entitled “SOHO Proposal (Basic Terms)” in Addendum (A) refers to the Spring Street location only. That page does not refer to any other store. See Def.’s Suppl., Ex. H (Werner Tr. at 148:21-150:13).

31. The page entitled “Financial Proposal” in Addendum (A) refers to the Spring street location only. That page does not relate to any other store. See Def.’s Suppl., Ex. H (Werner Tr. at 150:14-152:14).

32. The LOI is ambiguous and in many ways confusing:

- The very first line of the LOI states that the “following confirms the understanding for which the parties have agreed to in principal to enter into a contract”
- The last sentence of the first paragraph of the LOI states that Kate’s and Kolo intend to “enter into a more formal agreement on the following terms of the contract within a reasonable time.”
- The final sentence of Paragraph 1 of the LOI states that “at the same time as this Agreement is entered into, the parties will also conclude a rental agreement.”
- Just above the signature lines on page 2 of the LOI, it says that by “signing below each party agrees and consents [sic] to the above mention [sic] terms and agrees to act in good faith to complete the negotiations for additional terms which will be set forth in the Agreement.”

Def.’s Suppl., Ex. B; Ex. H (Werner Tr. at 121:11-164:12).

33. Paragraph 8 of the LOI reads as follows:

Term – The term of each sub-lease will be for one year from the commencement date. Kolo shall retain the right to renew each sub-lease for an additional one year period, and each year thereafter as it becomes due by giving 60 day notice to Kate’s prior to the termination date.

Def.’s Suppl., Ex. B. The “Basic Terms” page of Addendum (A) provide for a “one year” lease term with three one year options. Id., Ex. A. Paragraph 8 of the LOI and the Basic Terms page of Addendum (A) are inconsistent.

34. The “Basic Terms” page of Addendum (A) contains a termination provision that is not included in the LOI. That “Right to Terminate” states that “Kate’s has the right to terminate the agreement after the first year, and each year thereafter, unless Kolo continues to pay Kate’s a minimum of \$140/Per Square Foot plus 6% Royalty.” See Def.’s Suppl., Ex. A.

35. In the “Basic Terms” of Addendum (A), Kolo is required to provide Kate’s with monthly POS data. See Def.’s Suppl., Ex. A; see also Ex. H (Werner Tr. at 175:5-176:15)

36. The LOI contains a number of open-ended provisions. For example, the LOI refers to a “rental agreement” to be negotiated, “future addendums” to be negotiated, and “additional terms” that “will be set forth in the Agreement.” See Def.’s Suppl., Ex. B.

37. The LOI does not define “default.” See Def.’s Suppl., Ex. B.

38. The LOI does not include a “cure” provision. See Def.’s Suppl., Ex. H (Werner Tr. at 172:20-173:3); see also Ex. B.

39. The LOI does not define “material breach.” See Def.’s Suppl., Ex. B.

40. According to the “Basic Terms” of Addendum (A), Kate’s has a right to terminate Kolo’s shop in the Spring Street store “unless Kolo is, by the end of the first year of its possession, continuing to pay at a rate of at least \$140 per square foot and a royalty of 6% on all of Kolo’s net sales.” See Def.’s Suppl., Ex. A; see also Ex. H (Werner Tr. at 205:10-206:11).

E. Kolo’s Material Breach Of The Letter of Intent

40. Kolo has paid “rent” only for the months of June, July and August 2007. See Flax Witness Statement at ¶ 30; Ex. H (Werner Tr. at 216:13-217:18).

41. On November 7, 2007, Kolo advised that it would be placing its rent into escrow “until the existing differences between the parties are resolved.” See Def.’s Suppl., Ex. G. Thus, since September 2007 Kolo has paid nothing for its use of the space in the Spring Street store.

42. Kolo did not provide POS data from November 2007 through February 12, 2008. On February 13, 2008, following the deposition of Mr. Werner, Kolo produced POS data for the period June 1, 2007 through February 10, 2008. See Def.’s Suppl., Ex. F.

43. Kolo has never paid royalties at any time while it has occupied space at Spring Street. See Def.’s Suppl., Ex. H (Werner Tr. at 178:6-180:10; 215:24-216:12). But, the Financial Proposal of Addendum (A) provides for “Starting Royalty – 6%” without any such qualification. See Def.’s Suppl., Ex. A.

44. Addendum (A) shows a photo album bar in its diagrams for the Spring Street space. See Def.’s Suppl., Ex. A. Kolo has never established a photo album bar. Instead, Kolo set up three computers that can only permit customers to purchase Kolo products via the Internet. Kolo’s POS data does not capture those sales, and so Kolo’s POS data is lower than its actual sales level. See Flax Witness Statement at ¶ 33.

45. Kolo’s failures to abide by the terms of Addendum (A) constitute material breaches for which Kate’s should be permitted to terminate any leasehold interest that Kolo may have.

CONCLUSIONS OF LAW

1. The Court finds that Kolo and Kate’s did not come to a meeting of the minds so as to form a binding contract and, therefore, no valid lease exists. In order to form a contract, parties must come to a meeting of the minds. Foster v. Clifford, 42 Misc. 496, 499, 86

N.Y.S. 28 (N.Y. Sup. App. Term. 1904). Because Kate's contemplated further negotiation and the execution of a formal document, the LOI and Addendum (A) constitute only a preliminary agreement, not a binding contract. See Brown v. Cara, 420 F.3d 148, 153 (2d Cir. 2005) (holding that where parties "'contemplate[d] further negotiations and the execution of a formal instrument, a preliminary agreement d[id] not create a binding contract'").

2. The Court finds that where an agreement is unclear or ambiguous, its terms should be construed against the drafter. Arkwright-Boston Mfrs. Mut. Ins. Co. v. Calvert Fire Ins. Co., 695 F. Supp. 156, 160 (S.D.N.Y. 1988) (construing ambiguous agreement against defendant drafter); In re Fidelity Mortgage Investors, 12 B.R. 641, 645 (S.D.N.Y. 1981) (stating that "any ambiguity that might exist must be resolved against the draftsmen of the documents"). It is undisputed that the LOI and its Addendum were drafted entirely by Kolo, and their texts were never edited or modified by any representative of Kate's. Thus, to the extent that the terms of the LOI or Addendum (A) are unclear or ambiguous, they should be construed against Kolo.

3. The Court finds that when there is some doubt as to the existence of an executed document, the party asserting its existence must provide an adequate explanation for failing to produce the document. Nicosia v. Muller, 229 A.D.2d 964, 965, 645 N.Y.S.2d 385, 386 (N.Y. App. Div. 4th Dep't 1996). A sworn statement that a writing existed, on its own, is insufficient. Webb & Knapp v. United Cigar-Whelan Stores Corp., 276 A.D. 583, 584, 96 N.Y.S.2d 359 (N.Y. App. Div. 1st Dep't 1950). Kolo has failed to provide a sufficient explanation for its failure to produce an executed LOI.

4. The Court finds that the parties did not enter into any enforceable agreement at all with regard to the 3rd Avenue and 57th Street stores because neither the LOI nor Addendum (A) contain essential terms for those locations. The parties must agree upon essential

terms before an agreement can constitute an enforceable lease or sublease. Davis v. Dinkins, 206 A.D.2d 365, 366-67, 613 N.Y.S.2d 933, 935 (N.Y. App. Div. 2d Dep't 1994) (stating that "[i]n order for an agreement . . . to be enforceable as a lease, all the essential terms must be agreed upon"); see Harlow Apparel, Inc. v. David Pik Int'l, Inc., 106 A.D.2d 345, 345, 483 N.Y.S.2d 258, 260 (N.Y. App. Div. 1st Dep't 1984).

5. The essential terms of a lease or sublease include (1) the area to be leased, (2) the duration of the lease, and (3) the price to be paid. Davis, 206 A.D.2d at 367, 613 N.Y.S.2d 935 (stating that "[i]f any of these essential terms are missing and are not otherwise discernible by objective means, a lease has not been created"); see also Harlow Apparel, Inc., 106 A.D.2d at 345, 483 N.Y.S.2d at 260. Given the fact that neither the LOI nor Addendum (A) set forth a specific start date, a particularized location, or financial terms for any location other than 72 Spring Street, there can be no binding sublease for any location other than 72 Spring Street.

6. To the extent that the LOI and Addendum (A) can be construed to constitute a sublease with regard to the Spring Street store, it is undisputed that Kolo has materially breached its terms. The Court finds that Kolo's failure to pay rent for a period of at least seven months constitutes a "breach of a material term" of the LOI and Addendum (A). Fifty States Management Corp. v. Pioneer Auto Parks, Inc., 46 N.Y.2d 573, 575, 415 N.Y.S.2d 800 (N.Y. Ct. App. 1979); see also NL Indus., Inc. v. PaineWebber Inc., 720 F.Supp. 293, 299 (S.D.N.Y. 1989). The Court further finds that Kolo's failure to pay any royalty in connection with the operation of the Spring Street shop-in-shop also constitutes "a material breach." Awards.com v. Kinko's, Inc., 42 A.D.3d 178, 187, 834 N.Y.S.2d 147 (N.Y. App. Div. 1st Dep't 2007).

7. The Court finds that Kolo's material breaches of the terms of the LOI and Addendum (A) justify immediate termination of the agreement between Kate's and Kolo. A lease may be terminated based on one party's material breach. City of New York v. Skyway-Dyckman, Inc., 22 A.D.2d 506, 509, 256 N.Y.S.2d 840 (N.Y. App. Div. 1st Dep't 1965); Fifty States Mgmt. Corp., 46 N.Y.2d at 578, 415 N.Y.S.2d 800.

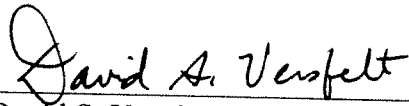
8. Kolo's repeated failure to pay rent constitutes a sufficient ground for termination of a lease. NL Indus., Inc., 720 F. Supp. at 299. Kolo's failure to pay any royalties in connection with the operation of the shop-in-shop also constitutes "a material breach, justifying contract termination." Awards.com, 42 A.D.3d at 187, 834 N.Y.S.2d 147 (citations omitted); see also S.E. Nichols, Inc. v. Am. Shopping Ctrs., Inc., 130 A.D.2d 855, 856-57, 515 N.Y.S.2d 638 (N.Y. App. Div. 3d Dep't 1987). Based on Kolo's repeated failure to pay rent and its failure to pay any royalties in connection with the operation of the shop-in-shop, immediate termination of the agreement between Kate's and Kolo is justified. Awards.com, 42 A.D.3d at 187.

9. The Court finds no basis upon which to imply a right for Kolo to cure its material breaches. Absent any right to cure in the subject commercial lease, the law will not imply a right to cure. RPAPL Section 753, which gives a residential tenant ten days to cure a default, is inapplicable to commercial leases. Grand Liberte Coop., Inc. v. Bilhaud, 126 Misc.2d 961, 964, 487 N.Y.S.2d 250 (N.Y. App. Term 1st Dep't 1984). Similarly, a tenant's right to obtain a stay of eviction by depositing the rent pursuant to RPAPL 751(1) "has been held to apply only to summary proceedings brought to enforce a condition subsequent that terminates a lease." NL Indus., Inc., 720 F.Supp. at 299. This case involves a commercial lease, and is not a summary proceeding; hence, Kolo has no statutory right to cure.

10. Kolo's material breaches of the terms of the LOI and Addendum (A) regarding the Spring Street store warrant a judgment awarding possession of the Kolo space in the Spring Street store to Kate's.

Dated: February 15, 2008
New York, New York

Respectfully submitted,

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**DEFENDANT'S EXHIBIT SUPPLEMENT TO
PROPOSED FINDINGS OF FACT**

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EXHIBIT A



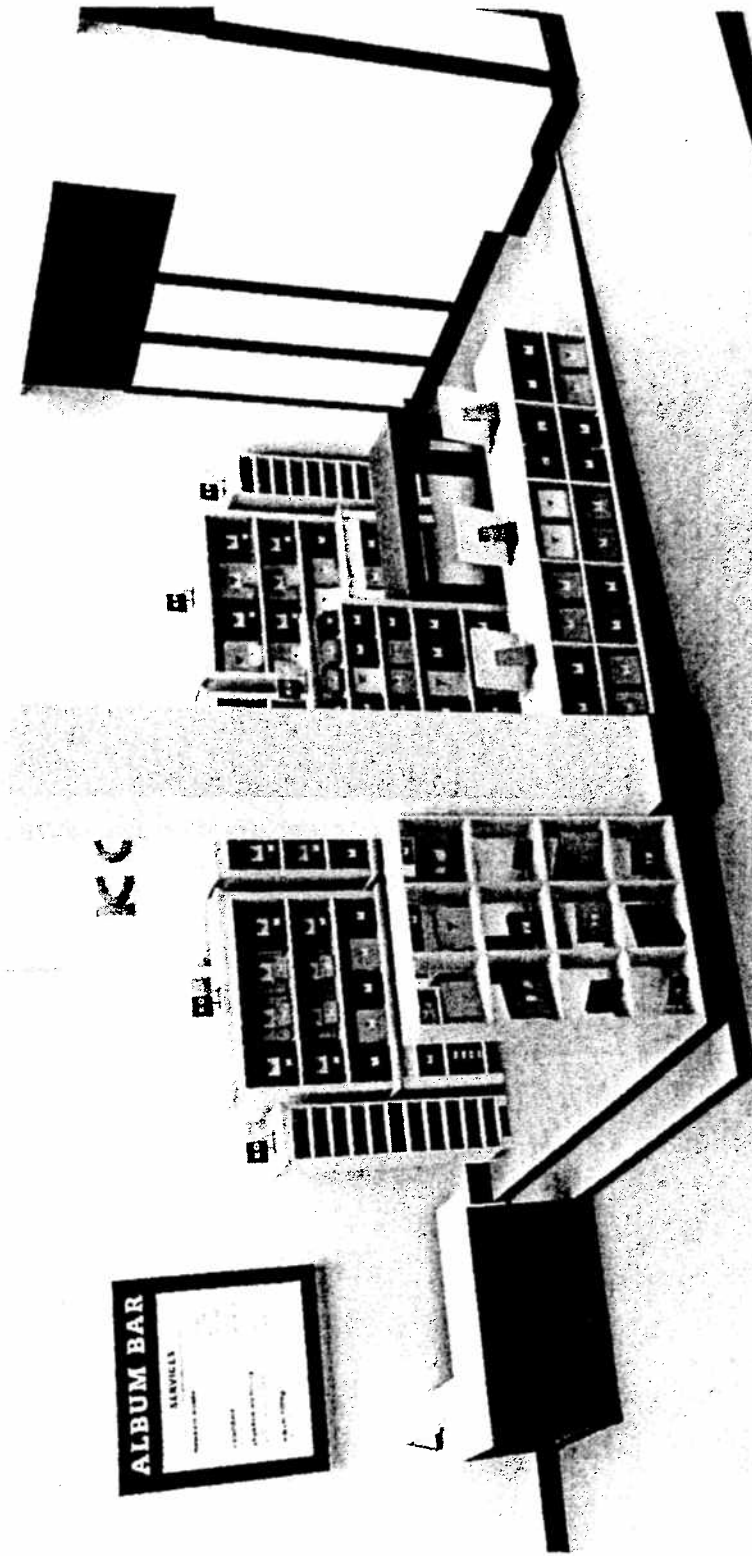
Kolo Store at the new SOHO location

April 2007



KP 0033

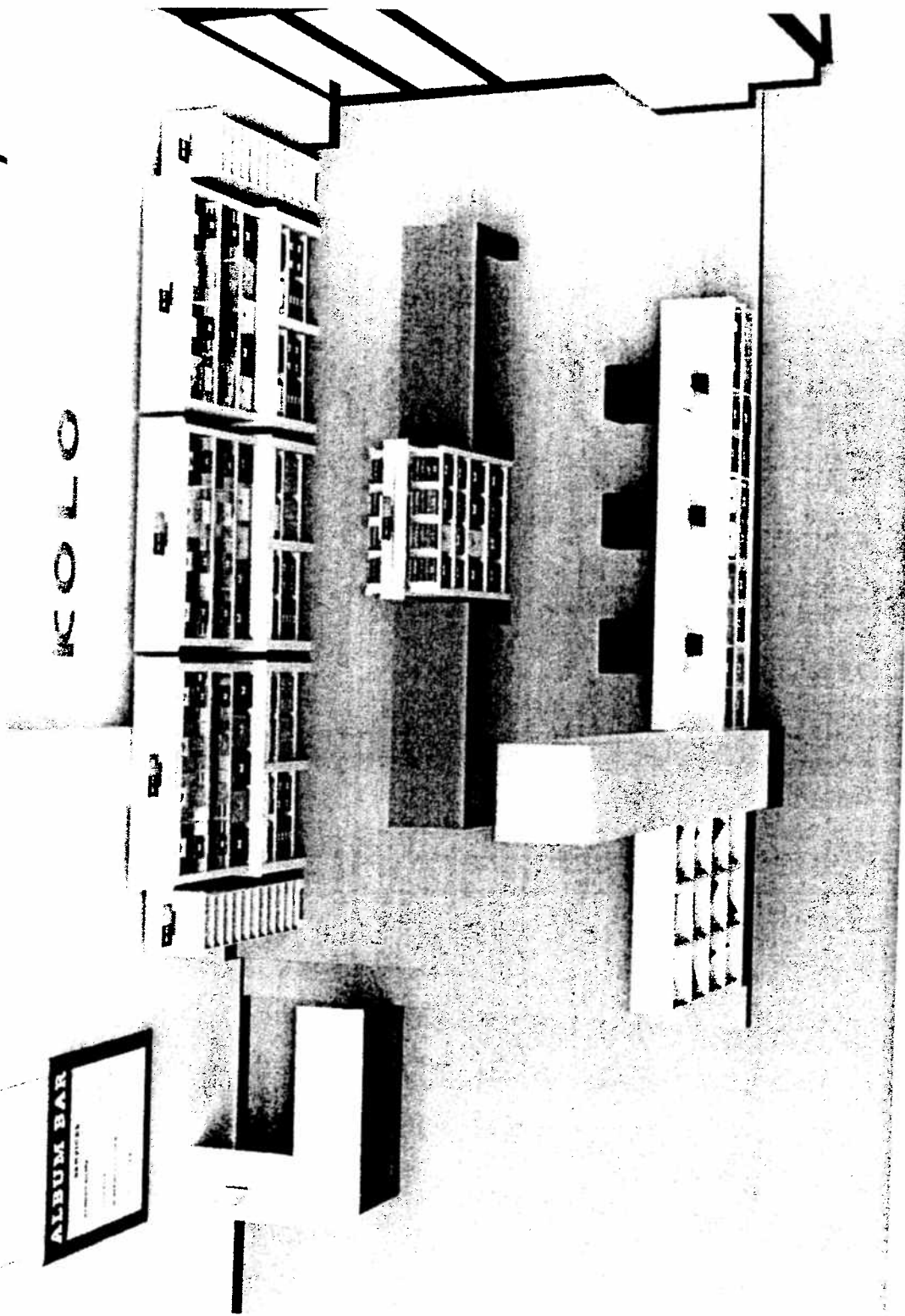
SOHO floor plan



KO

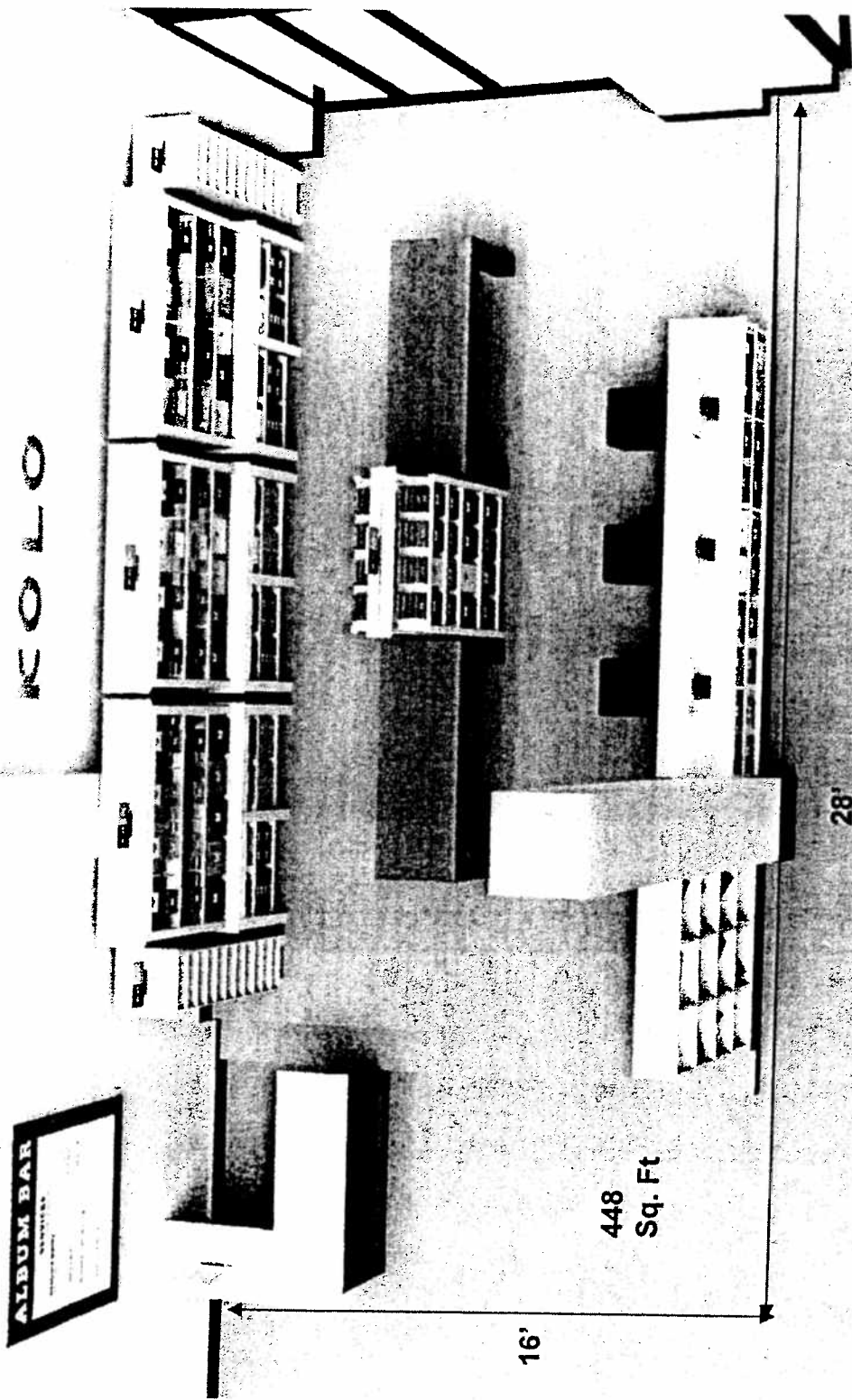
KP 0034

SOHO layout proposal (illustration #1)



KP 0035

SOHO layout proposal (illustration #2)



KP 0036

SOHO Proposal (Basic Terms)

1. Lease Term – One Year
2. Lease Options – Kolo has the right to (3) One Year Options.
3. Right to Terminate – Kate's has the right to terminate the agreement after the first year, and each year thereafter, unless Kolo continues to pay Kate's a minimum of \$140/Per Square Foot plus 6% Royalty.
4. Kolo will provide Kate's with monthly POS Data.
5. Kolo will pay Kate's monthly rental payments according to the financial proposal enclosed.
6. Kolo will pay Kate's monthly royalty payments according to the financial proposal enclosed.
7. Kate's will provide Kolo with landlord's consent to the sub-lease and a non-disturbance.

KO

KP 0037

Financial Proposal

1. Starting Rent Per Square Foot - \$75.00
2. Starting Royalty - 6%
3. Royalty Increases – Royalties increase according to the following revenue schedule;
Net Sales of \$250,000 to \$449,000 – 6%
Net Sales of \$450,000 to \$649,000 – 10%
Net Sales of \$650,00 and up – 11%
4. Rent Increases – Rent increases according to the following revenue schedule;
Net Sales of \$250,000 – \$75/Sq.Ft.
Net Sales of \$350,000 – \$79/Sq.Ft.
Net Sales of \$450,000 – \$83/Sq.Ft.
Net Sales of \$550,000 – \$90/Sq.Ft.
Net Sales of \$650,000 – \$100/Sq.Ft.
Net Sales of \$750,000 – \$135/Sq.Ft.

KO

KP 0038

Financial Forecast

[illegible]

OY

KP 0039

Comparison of Kate's profitability under the existing vs. new model

| | | | | | | | | |
|-----------------------------|-------------|-------------|-------------|-----------|-----------|-----------|-----------|-----|
| Sales | \$155,000 | \$250,000 | \$350,000 | \$450,000 | \$550,000 | \$650,000 | \$750,000 | 97% |
| Net Sales | \$150,350 | \$242,500 | \$339,500 | \$436,500 | \$533,500 | \$630,500 | \$727,500 | 52% |
| Gross Margin | \$78,182 | \$126,100 | \$176,540 | \$226,980 | \$277,420 | \$327,860 | \$378,300 | |
| Operating Expenses | | | | | | | | |
| Store Operating Expenses | \$48,112 | \$77,600 | \$108,640 | \$139,680 | \$170,720 | \$201,760 | \$232,800 | 32% |
| Corporate Overhead | \$16,539 | \$26,675 | \$37,345 | \$48,015 | \$58,685 | \$69,355 | \$80,025 | 11% |
| Total Operating Expenses | \$64,651 | \$104,275 | \$145,985 | \$187,695 | \$229,405 | \$271,115 | \$312,825 | 43% |
| EBITDA | \$13,532 | \$21,825 | \$30,555 | \$39,285 | \$48,015 | \$56,745 | \$65,475 | 9% |
| Depreciation & Amortization | \$3,007 | \$4,850 | \$6,790 | \$8,730 | \$10,670 | \$12,610 | \$14,550 | 2% |
| EBIT | \$10,525 | \$16,975 | \$23,765 | \$30,555 | \$37,345 | \$44,135 | \$50,925 | 7% |
| Other Income and Expenses | \$4,511 | \$7,275 | \$10,185 | \$13,095 | \$16,005 | \$18,915 | \$21,825 | 3% |
| Net Income | \$6,014 | \$9,700 | \$13,580 | \$17,460 | \$21,340 | \$25,220 | \$29,100 | 4% |
| Future Net Income | \$ (14,187) | \$ (6,680) | \$ (6,680) | \$18,372 | \$31,363 | \$51,868 | \$78,288 | 6% |
| Difference | \$ (6,014) | \$ (23,887) | \$ (20,260) | \$912 | \$10,023 | \$26,648 | \$49,188 | 8% |
| Future Net Income % | | | | | | | | 11% |

\$100,000

\$80,000

\$60,000

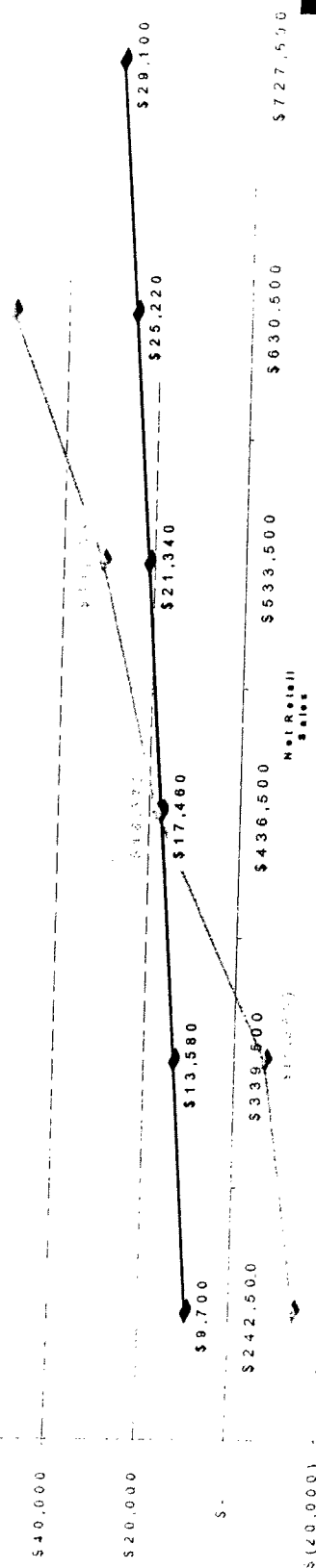
\$40,000

\$20,000

\$

\$(20,000)

Net income under existing model
Net income under new model



KO

KP 0040

Comparative analysis of net income projections

| | | | | | | |
|---|------------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| Annual Retail Sales <i>Kolo Sales at Spring</i> | \$250,000 | \$ 350,000 | \$ 450,000 | \$ 550,000 | \$ 650,000 | \$ 750,000 |
| Annual Net Retail Sales | \$242,500 | \$ 339,500 | \$ 436,500 | \$ 533,500 | \$ 630,500 | \$ 727,500 |
| Kates Total Revenues (Roy. & Rent) | <u>\$48,300</u> | \$55,808 | \$80,859 | \$93,850 | \$114,355 | \$140,775 |
| Kates Operating Expenses | \$62,487 | \$62,487 | \$62,487 | \$62,487 | \$62,487 | \$62,487 |
| Kates Net Operating Income | <u>-\$14,187</u> | <u>-\$6,680</u> | <u>\$18,372</u> | <u>\$31,363</u> | <u>\$51,868</u> | <u>\$78,288</u> |
| Kolo Gross Profit | \$126,382 | \$176,935 | \$210,028 | \$256,701 | \$297,069 | \$342,771 |
| Kolo Operating Expenses | \$151,703 | \$167,455 | \$183,292 | \$200,648 | \$219,213 | \$249,028 |
| Kolo Net Income | <u>-\$33,654</u> | <u>\$1,146</u> | <u>\$18,402</u> | <u>\$47,719</u> | <u>\$69,522</u> | <u>\$85,410</u> |

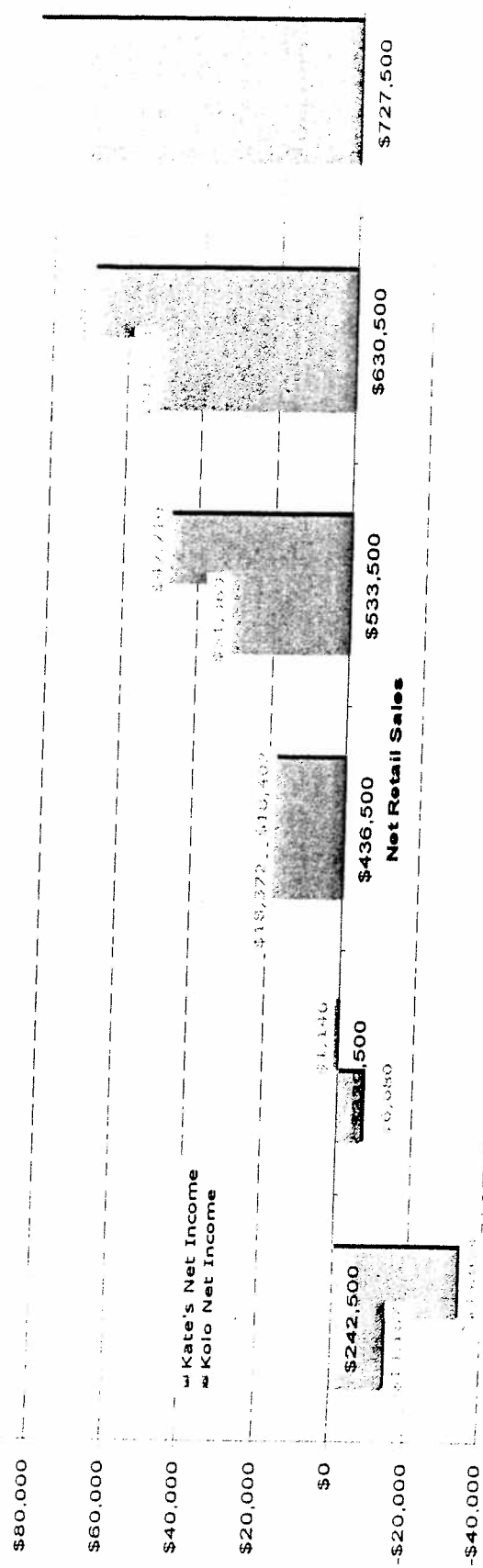


EXHIBIT B

Letter of Intent

between

Kate's Paperie LTD and Affiliates.,

hereinafter named "Kate's"
and

Kolo Retail, LLC,

hereafter named "Kolo"

The following confirms the understanding for which the parties have agreed to in principal to enter into a contract hereinafter called ("Agreement") for Kolo to lease retail space from Kate's Paperie, LLC and to operate a retail store within each of three Kate's stores. It is intended that the parties will enter into a more formal agreement on the following terms of the contract within a reasonable time.

- 1. Locations and Demised Premises** - Kate's commits to Kolo to provide rental space in the following three of it's Manhattan, NY locations; Spring Street, 3rd Avenue, and 57th Street. Kolo Retail, LLC is hereby committing to displaying and selling products only within the dedicated space. The size of each location shall vary between 250 square feet to 450 square feet. The attached Addendum (A) defines the agreed upon space at the Spring Street Store. Layout and drawings showing such dedicated space is attached hereto in Addendum (A). Together with and at the same time as this Agreement is entered into, the parties will also conclude a rental agreement, and Kate's will provide Kolo a consent from the current landlord(s) for such rights to sub-lease.
- 2. Fixtures, Furnishings & Equipment** - Fixtures, furnishings and equipment such as displays, computers, tables, etc. shall be completely provided by and owned by Kolo. Other improvements or build out shall be discussed and agreed upon between the parties at a later date.
- 3. Commencement** - The commencement of the first Kolo retail store within the Kate's store concept will begin on or around June 1, 2007 located on Spring Street. The other locations, 3rd Avenue and 57th Street, will commence approximately one month thereafter. Both parties shall begin discussions to come to a mutual agreement to the specific locations for the 3rd Avenue and 57th Street locations by June 1, 2007. Notwithstanding the above, should both parties fail to mutually agree to the locations of the other Kate's stores then Kolo shall have the right to terminate the Agreement, vacating the Spring Street location, by giving a 30 day notice to Kate's.
- 4. Staff and Payroll Expenses** - Kolo shall provide its own representatives, employees and staff to operate each store within Kate's store. Both parties have agreed that in the event it becomes necessary to utilize Kate's staff, whether on a part-time or full-time basis, Kolo shall reimburse Kate's for any payroll expenses.

5. **Inventory** - Upon commencement of each location, starting with the Spring Street location, Kolo will agree to accept responsibility of the current inventory that Kate's provides to Kolo for that location. All inventory must be in saleable condition when provided by Kate's. At the time of commencement, for each additional store, Kolo will issue a credit memo to Kate's for receiving such qualified inventory.
6. **Insurance** - Kolo will agree to insure all contents inside the demised premises.
7. **Compensation** - Each location shall have its own profit and loss projections and compensation schedule which will describe the amount to be paid to Kate's. It is agreed that each compensation schedule will be attached as an additional addendum and made apart of the Agreement. The compensation schedule for Spring Street is also attached hereto in Addendum (A). Kolo shall compensate Kate's according to the compensation schedule set forth in Addendum (A) for the Spring Street location and according to future addendums for the other locations as they are agreed upon. Each location shall have its own projections and compensation schedule which shall describe the amount to be paid to Kate's. It is agreed that each compensation schedule will be attached as an additional addendum and made apart of the Agreement. Compensation to Kate's will be in the form of base rental income plus an additional royalty income which formula is also set forth in the compensation schedule and attached to the Agreement.
8. **Term** - The term of each sub-lease will be for one year from the commencement date. Kolo shall retain the right to renew each sub-lease for an additional one year period, and each year thereafter as it becomes due by giving 60 day notice to Kate's prior to the termination date.
9. **Confidentiality** - Both parties agree to keep all information about the terms of this Agreement confidential. Both parties also acknowledge that they have signed a Mutual Confidentiality Agreement prior to entering into this Agreement stating to keep all information confidential.

By signing below each party agrees and consents to the above mention terms and agrees to act in good faith to complete the negotiations for additional terms which will be set forth in the Agreement.

Kolo Retail, LLC

By it's Date

Kate's Paperie LTD and Affilitates

By it's Date

EXHIBIT C



Kates_V4.ppt (582 KB)

From: master file flax <lionel.flax@gmail.com>
Date: Wed, 3 Oct 2007 20:30:25 -0400
Subject: Fwd: KAt'e's proposal
To: "Flax, Leonard" <lflax@katespaperie.com>, "John A. Golieb" <jag@mggpclaw.com>

----- Forwarded message -----

From: Keith Werner <kkw@kolo-usa.com>
Date: May 6, 2007 8:59 PM
Subject: RE: KAt'e's proposal
To: Lionel Flax <lionel.flax@gmail.com>

Hi Lionel,

Here is the original proposal. Let me know if you want to get together tommorrow in the City.

Thanks,

Keith

-----Original Message-----

From: Lionel Flax [mailto:lionel.flax@gmail.com]
Sent: Sunday, May 06, 2007 3:08 PM
To: kw@kolo-usa.com
Subject: KAt'e's proposal

Keith, I think you hand delivred me the proposal. I left it in the office and would like to look at it today. If you get this please send it to me electronically.
Regards

On 5/6/07, Keith Werner <kkw@kolo-usa.com> wrote:

> Hi Lionel,

>

> Sorry we were unable to talk again the other day. I will be arriving
> back to the US this weekend and plan to be at the creditors meeting on
> Monday, 5/7. Also, enclosed please find a draft of the letter of
> intent. Sorry for the delay as you can imagine my schedule has been
extremely busy. Please review it and let me know if we are on the
same page. The reference to the addendum is the proposal that I had
> originally sent you so if you have any question about it then you can
> refer to the original proposal. We are full steam ahead for getting
> everything ready for Spring in June. I will try calling you over the

> weekend. Maybe we can get together after the meeting on Monday ?
>
> Best regards,
>
>
> Keith Werner
> Executive Vice President
> KOLO, LLC.
> kkw@kolo-usa.com
> 860-547-0367 Ext 222
> 860-547-0598 FAX
> www.kolo.com
>
>
>
>
>

--
Lionel Flax
Chief Executive Officer
Kate's Paperie
646-352-1297

EXHIBIT D

From: Lionel Flax <lionel.flax@gmail.com>
Date: Thu, 10 May 2007 13:50:26 -0400
Subject: Re:
To: kw@kolo-usa.com

Did u find it?

On 5/10/07, Keith Werner <kkw@kolo-usa.com> wrote:
> Thank you Lionel ! I will look for it now.

>

> Keith

>

> -----Original Message-----

> From: Lionel Flax [mailto:lionel.flax@gmail.com]

> Sent: Wednesday, May 09, 2007 2:36 PM

> To: kw@kolo-usa.com

> Subject: Re:

>

> I just sent this through signed.

>

> On 5/8/07, Keith Werner <kkw@kolo-usa.com> wrote:

> >

> >

> >

> > Hi Lionel,

> >

> > Just checking in with you to see how you are doing with signing the
> > LOI. I am going to be putting my staff together with Zelma to
> > coordinate the setup of the shop in shop. We are planning on
> > sending a team down next week for the show and I thought we could
> > get everyone together at that time to go over the setup. I will also
> > be having my inventory management team touch base with the Kate's
> > person in charge of purchasing Kolo so we can begin to transition
> > the inventory for the new store. Could you please let me know who
> > that person would be and how
> > to contact them as soon as possible.

> >

> > Talk to you soon.

> >

> >

> >

> > Keith Werner

> > Executive Vice President

> > KOLO, LLC.

> > kkw@kolo-usa.com

> > 860-547-0367 Ext 222

> > 860-547-0598 FAX

> > www.kolo.com

> >

> >

> >

> >

> >

> --

> Lionel Flax

> Chief Executive Officer

> Kate's Paperie

KP 0044

> 646-352-1297

>

>

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Lionel Flax
Chief Executive Officer
Kate's Paperie
646-352-1297

KP 0045

EXHIBIT E

From: Keith Werner <kkw@kolo-usa.com>
Date: Sat, 12 May 2007 03:36:50 -0400
Subject:
To: Lionel Flax <lionel.flax@gmail.com>

Hi Lionel,

I did received your faxed LOI. Thank you very much. I will bring a copy of the signed one to you on Tuesday. I thought we could meet around 1pm at the Mercer Café for lunch if that is ok with you ? Remember we will be meeting with Akira Ito - President of Ito-Ya Japan and Shin Ueno - Senior Manager of Sourcing Exports.

Did you get any where with the issue of the leases today. I could not get a hold of John Scholte. But I will try him on Monday.

Regards,

Keith Werner
Executive Vice President
KOLO, LLC.
kkw@kolo-usa.com
960-547-0367 Ext 222
60-547-0598 FAX
www.kolo.com

KP 0049

EXHIBIT F

Daily Sales by Store

6/1/2007 - 12/31/2007

2 - Kolo Soho

| | | | | | |
|------------------|------------|-----------|----------|----------|------------|
| Fri - 06/01/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 0.00 | 0.00 | 0.00 | 0.00 |
| Sat - 06/02/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 0.30 | 98.70 | 5.92 | 104.62 |
| Sun - 06/03/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 47.55 | 837.45 | 50.30 | 887.75 |
| Mon - 06/04/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 13.85 | 643.15 | 38.61 | 681.76 |
| Tue - 06/05/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 30.10 | 724.90 | 43.50 | 768.40 |
| Wed - 06/06/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 5.85 | 729.15 | 43.75 | 772.90 |
| Thu - 06/07/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 15.93 | 558.57 | 33.53 | 592.10 |
| Fri - 06/08/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 32.78 | 993.22 | 59.60 | 1,052.82 |
| Sat - 06/09/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 29.65 | 633.35 | 43.10 | 676.45 |
| Sun - 06/10/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 21.30 | 392.70 | 23.45 | 416.15 |
| Mon - 06/11/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 29.55 | 1,176.45 | 86.24 | 1,261.69 |
| Tue - 06/12/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 24.58 | 631.92 | 46.84 | 678.76 |
| Wed - 06/13/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 8.15 | 678.85 | 56.85 | 735.70 |
| Thu - 06/14/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 29.98 | 956.81 | 80.14 | 1,036.95 |
| Fri - 06/15/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 120.84 | 1,315.25 | 110.13 | 1,425.38 |
| Sat - 06/16/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 65.85 | 1,312.65 | 109.94 | 1,422.59 |
| Sun - 06/17/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 25.30 | 692.70 | 58.02 | 750.72 |
| Mon - 06/18/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 36.10 | 840.90 | 70.43 | 911.33 |
| Tue - 06/19/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 36.63 | 1,106.87 | 92.68 | 1,199.55 |
| Wed - 06/20/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 9.49 | 831.34 | 69.63 | 900.97 |
| Thu - 06/21/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 45.15 | 802.85 | 67.24 | 870.09 |
| Fri - 06/22/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 11.00 | 831.00 | 69.62 | 900.62 |

| | | | | | |
|------------------|-------------------|------------------|-----------------|-----------------|-------------------|
| Sat - 06/23/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 35.70 | 1,025.30 | 85.83 | 1,111.13 |
| Sun - 06/24/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 28.05 | 981.95 | 82.23 | 1,064.18 |
| Mon - 06/25/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 18.70 | 649.30 | 54.37 | 703.67 |
| Tue - 06/26/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 17.85 | 425.15 | 35.63 | 460.78 |
| Wed - 06/27/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 4.00 | 535.50 | 44.86 | 580.36 |
| Thu - 06/28/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 43.05 | 1,278.95 | 107.07 | 1,386.02 |
| Fri - 06/29/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 23.70 | 1,180.30 | 98.87 | 1,279.17 |
| Sat - 06/30/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 13.55 | 410.45 | 34.39 | 444.84 |
| Sun - 07/01/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 9.65 | 418.35 | 35.06 | 453.41 |
| Mon - 07/02/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 10.58 | 308.92 | 25.86 | 334.78 |
| Tue - 07/03/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 27.80 | 429.20 | 35.96 | 465.16 |
| Wed - 07/04/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 6.45 | 202.55 | 16.96 | 219.51 |
| Thu - 07/05/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 14.10 | 502.40 | 42.08 | 544.48 |
| Fri - 07/06/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 45.23 | 1,200.77 | 100.57 | 1,301.34 |
| Sat - 07/07/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 18.20 | 562.80 | 47.12 | 609.92 |
| Sun - 07/08/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 12.10 | 705.90 | 59.16 | 765.06 |
| Mon - 07/09/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 44.85 | 954.65 | 79.92 | 1,034.57 |
| Tue - 07/10/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 34.25 | 740.75 | 62.07 | 802.82 |
| Wed - 07/11/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 50.35 | 886.65 | 74.23 | 960.88 |
| Thu - 07/12/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 42.90 | 1,379.10 | 115.49 | 1,494.59 |
| Fri - 07/13/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 53.13 | 1,187.37 | 99.41 | 1,286.78 |
| Sat - 07/14/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 17.65 | 672.35 | 56.30 | 728.65 |
| Sun - 07/15/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 17.05 | 625.95 | 52.41 | 678.36 |
| Mon - 07/16/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |

| | | | | | |
|------------------|------------|-----------|----------|----------|------------|
| | | 28.79 | 1,095.21 | 91.71 | 1,186.92 |
| Tue - 07/17/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 7.88 | 650.12 | 54.46 | 704.58 |
| Wed - 07/18/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 15.25 | 561.75 | 47.06 | 608.81 |
| Thu - 07/19/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 63.90 | 1,175.10 | 98.42 | 1,273.52 |
| Fri - 07/20/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 19.58 | 845.92 | 70.84 | 916.76 |
| Sat - 07/21/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 48.00 | 965.00 | 80.83 | 1,045.83 |
| Sun - 07/22/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 10.65 | 305.35 | 25.57 | 330.92 |
| Mon - 07/23/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 22.10 | 533.90 | 44.72 | 578.62 |
| Tue - 07/24/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 74.98 | 1,675.02 | 140.32 | 1,815.34 |
| Wed - 07/25/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 52.90 | 655.60 | 54.92 | 710.52 |
| Thu - 07/26/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 40.20 | 1,107.80 | 92.76 | 1,200.56 |
| Fri - 07/27/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 10.20 | 254.80 | 21.34 | 276.14 |
| Sat - 07/28/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 23.15 | 906.35 | 75.90 | 982.25 |
| Sun - 07/29/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 21.25 | 383.75 | 32.14 | 415.89 |
| Mon - 07/30/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 60.35 | 1,391.65 | 116.54 | 1,508.19 |
| Tue - 07/31/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 23.55 | 955.45 | 80.02 | 1,035.47 |
| Wed - 08/01/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 7.25 | 833.75 | 69.82 | 903.57 |
| Thu - 08/02/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 36.25 | 1,084.75 | 90.88 | 1,175.63 |
| Fri - 08/03/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 22.00 | 1,132.00 | 94.75 | 1,226.75 |
| Sat - 08/04/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 32.45 | 980.55 | 82.13 | 1,062.68 |
| Sun - 08/05/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 5.05 | 243.95 | 20.43 | 264.38 |
| Mon - 08/06/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 17.00 | 412.00 | 34.51 | 446.51 |
| Tue - 08/07/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 2.50 | 478.50 | 40.07 | 518.57 |
| Wed - 08/08/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 0.90 | 177.10 | 14.83 | 191.93 |
| Thu - 08/09/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |

| | | | | | |
|------------------|------------|-----------|----------|----------|------------|
| | | 16.70 | 512.30 | 42.89 | 555.19 |
| Fri - 08/10/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 14.15 | 363.85 | 30.46 | 394.31 |
| Sat - 08/11/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 26.55 | 1,067.21 | 89.38 | 1,156.59 |
| Sun - 08/12/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 10.60 | 377.40 | 31.62 | 409.02 |
| Mon - 08/13/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 31.63 | 755.37 | 63.23 | 818.60 |
| Tue - 08/14/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 23.45 | 677.55 | 56.73 | 734.28 |
| Wed - 08/15/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 27.15 | 867.85 | 72.68 | 940.53 |
| Thu - 08/16/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 22.33 | 742.67 | 62.19 | 804.86 |
| Fri - 08/17/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 24.45 | 1,032.55 | 86.47 | 1,119.02 |
| Sat - 08/18/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 10.95 | 306.30 | 25.65 | 331.95 |
| Sun - 08/19/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 18.60 | 763.40 | 63.93 | 827.33 |
| Mon - 08/20/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 20.40 | 570.60 | 47.77 | 618.37 |
| Tue - 08/21/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 20.45 | 719.05 | 60.23 | 779.28 |
| Wed - 08/22/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 18.30 | 759.70 | 63.64 | 823.34 |
| Thu - 08/23/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 18.10 | 901.90 | 75.54 | 977.44 |
| Fri - 08/24/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 116.35 | 1,726.65 | 144.58 | 1,871.23 |
| Sat - 08/25/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 47.13 | 1,094.37 | 91.60 | 1,185.97 |
| Sun - 08/26/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 32.65 | 1,064.35 | 89.12 | 1,153.47 |
| Mon - 08/27/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 19.78 | 862.22 | 72.21 | 934.43 |
| Tue - 08/28/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 25.05 | 963.95 | 80.72 | 1,044.67 |
| Wed - 08/29/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 68.69 | 1,366.26 | 113.76 | 1,480.02 |
| Thu - 08/30/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 72.50 | 1,198.45 | 99.72 | 1,298.17 |
| Fri - 08/31/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 74.28 | 842.22 | 70.54 | 912.76 |
| Sat - 09/01/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 38.95 | 1,010.05 | 84.58 | 1,094.63 |

| | | | | | |
|------------------|-------------------|------------------|-----------------|-----------------|-------------------|
| Sun - 09/02/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 20.15 | 429.85 | 35.97 | 465.82 |
| Mon - 09/03/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 46.06 | 1,043.95 | 87.44 | 1,131.39 |
| Tue - 09/04/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 42.75 | 1,765.20 | 147.25 | 1,912.45 |
| Wed - 09/05/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 53.75 | 1,189.20 | 99.04 | 1,288.24 |
| Thu - 09/06/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 50.15 | 1,039.80 | 86.45 | 1,126.25 |
| Fri - 09/07/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 444.30 | 1,618.65 | 135.01 | 1,753.66 |
| Sat - 09/08/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 25.85 | 719.15 | 60.22 | 779.37 |
| Sun - 09/09/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 22.73 | 840.27 | 70.35 | 910.62 |
| Mon - 09/10/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 86.35 | 736.65 | 61.74 | 798.39 |
| Tue - 09/11/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 213.95 | 476.05 | 39.84 | 515.89 |
| Wed - 09/12/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 35.77 | 992.73 | 83.14 | 1,075.87 |
| Thu - 09/13/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | -259.95 | 707.45 | 59.23 | 766.68 |
| Fri - 09/14/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 36.05 | 882.95 | 73.95 | 956.90 |
| Sat - 09/15/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 5.75 | 764.25 | 64.01 | 828.26 |
| Sun - 09/16/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 68.35 | 1,669.65 | 139.79 | 1,809.44 |
| Mon - 09/17/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 8.00 | 1,037.90 | 85.78 | 1,123.68 |
| Tue - 09/18/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 22.30 | 838.70 | 70.24 | 908.94 |
| Wed - 09/19/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | -25.82 | -192.68 | -16.13 | -208.81 |
| Thu - 09/20/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 10.45 | 367.55 | 30.75 | 398.30 |
| Fri - 09/21/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 30.30 | 812.70 | 68.08 | 880.78 |
| Sat - 09/22/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 9.50 | 819.50 | 68.64 | 888.14 |
| Sun - 09/23/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 28.15 | 798.85 | 66.90 | 865.75 |
| Mon - 09/24/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |
| | | 9.95 | 662.55 | 55.51 | 718.06 |
| Tue - 09/25/2007 | <u># of Trans</u> | <u>Sale Disc</u> | <u>Subtotal</u> | <u>Sale Tax</u> | <u>Sale Total</u> |

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|------------------|------------|-----------|----------|----------|------------|
| | | 27.10 | 864.90 | 72.42 | 937.32 |
| Wed - 09/26/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 16.83 | 1,602.23 | 118.60 | 1,720.83 |
| Thu - 09/27/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 2.50 | 509.50 | 42.69 | 552.19 |
| Fri - 09/28/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 13.15 | 661.85 | 55.44 | 717.29 |
| Sat - 09/29/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 17.65 | 1,021.95 | 85.60 | 1,107.55 |
| Sun - 09/30/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 7.25 | 502.75 | 42.12 | 544.87 |
| Mon - 10/01/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 19.60 | 1,667.55 | 136.83 | 1,804.38 |
| Tue - 10/02/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 16.15 | 629.85 | 52.71 | 682.56 |
| Wed - 10/03/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 6.30 | 638.65 | 52.92 | 691.57 |
| Thu - 10/04/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 15.07 | 1,233.43 | 103.30 | 1,336.73 |
| Fri - 10/05/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 59.45 | 1,587.55 | 132.98 | 1,720.53 |
| Sat - 10/06/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 34.45 | 1,204.55 | 100.87 | 1,305.42 |
| Sun - 10/07/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 13.80 | 736.20 | 61.65 | 797.85 |
| Mon - 10/08/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 15.95 | 899.05 | 75.31 | 974.36 |
| Tue - 10/09/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 32.10 | 981.25 | 80.63 | 1,061.88 |
| Wed - 10/10/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 14.80 | 618.20 | 51.75 | 669.95 |
| Thu - 10/11/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 15.58 | 753.87 | 62.56 | 816.43 |
| Fri - 10/12/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 20.80 | 857.09 | 71.78 | 928.87 |
| Sat - 10/13/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 18.60 | 1,174.40 | 98.39 | 1,272.79 |
| Sun - 10/14/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 8.60 | 329.40 | 27.61 | 357.01 |
| Mon - 10/15/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 23.25 | 651.70 | 53.99 | 705.69 |
| Tue - 10/16/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 122.48 | 612.02 | 51.28 | 663.30 |
| Wed - 10/17/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 8.60 | 999.47 | 81.85 | 1,081.32 |
| Thu - 10/18/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 32.45 | 921.55 | 77.13 | 998.68 |
| Fri - 10/19/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |

| | | | | | |
|------------------|------------|-----------|----------|----------|------------|
| | | 4.45 | 512.55 | 42.96 | 555.51 |
| Sat - 10/20/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 47.82 | 1,192.08 | 92.95 | 1,285.03 |
| Sun - 10/21/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 19.70 | 1,083.30 | 90.72 | 1,174.02 |
| Mon - 10/22/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 2.95 | 217.05 | 18.21 | 235.26 |
| Tue - 10/23/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 11.40 | 338.10 | 28.33 | 366.43 |
| Wed - 10/24/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 3.75 | 597.25 | 50.05 | 647.30 |
| Thu - 10/25/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 6.25 | 658.75 | 55.17 | 713.92 |
| Fri - 10/26/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 41.80 | 1,136.65 | 85.77 | 1,222.42 |
| Sat - 10/27/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 31.90 | 1,373.10 | 115.02 | 1,488.12 |
| Sun - 10/28/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 0.75 | 858.25 | 71.91 | 930.16 |
| Mon - 10/29/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 4.70 | 584.30 | 48.94 | 633.24 |
| Tue - 10/30/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 19.40 | 952.55 | 79.20 | 1,031.75 |
| Wed - 10/31/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 9.80 | 384.15 | 31.61 | 415.76 |
| Thu - 11/01/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 20.35 | 907.65 | 76.02 | 983.67 |
| Fri - 11/02/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 37.38 | 942.07 | 72.04 | 1,014.11 |
| Sat - 11/03/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 26.53 | 825.97 | 69.17 | 895.14 |
| Sun - 11/04/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 9.25 | 456.75 | 38.25 | 495.00 |
| Mon - 11/05/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 24.70 | 548.80 | 45.96 | 594.76 |
| Tue - 11/06/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 19.30 | 1,282.70 | 107.48 | 1,390.18 |
| Wed - 11/07/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 5.65 | 538.35 | 45.09 | 583.44 |
| Thu - 11/08/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 49.20 | 1,635.75 | 133.87 | 1,769.62 |
| Fri - 11/09/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 24.23 | 1,091.27 | 91.42 | 1,182.69 |
| Sat - 11/10/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 1.80 | 791.20 | 66.30 | 857.50 |
| Sun - 11/11/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 52.60 | 1,217.40 | 101.96 | 1,319.36 |

| | | | | | |
|------------------|------------|-----------|----------|----------|------------|
| Mon - 11/12/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 19.45 | 1,104.05 | 92.46 | 1,196.51 |
| Tue - 11/13/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 40.95 | 1,241.55 | 104.00 | 1,345.55 |
| Wed - 11/14/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 18.55 | 1,118.35 | 92.51 | 1,210.86 |
| Thu - 11/15/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 78.35 | 1,990.34 | 161.00 | 2,151.34 |
| Fri - 11/16/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 28.75 | 1,265.70 | 105.41 | 1,371.11 |
| Sat - 11/17/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 45.75 | 2,322.25 | 194.46 | 2,516.71 |
| Sun - 11/18/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 20.60 | 1,052.40 | 88.12 | 1,140.52 |
| Mon - 11/19/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 88.00 | 2,448.95 | 204.60 | 2,653.55 |
| Tue - 11/20/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 5.55 | 1,246.40 | 103.84 | 1,350.24 |
| Wed - 11/21/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 6.70 | 2,113.75 | 176.49 | 2,290.24 |
| Fri - 11/23/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 37.55 | 1,279.35 | 72.25 | 1,351.60 |
| Sat - 11/24/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 31.75 | 987.25 | 82.69 | 1,069.94 |
| Sun - 11/25/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 5.85 | 1,150.15 | 96.33 | 1,246.48 |
| Mon - 11/26/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 15.25 | 789.75 | 66.17 | 855.92 |
| Tue - 11/27/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 25.60 | 1,016.35 | 84.54 | 1,100.89 |
| Wed - 11/28/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 16.30 | 1,447.70 | 121.30 | 1,569.00 |
| Thu - 11/29/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 25.60 | 661.40 | 55.42 | 716.82 |
| Fri - 11/30/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 18.30 | 666.70 | 55.87 | 722.57 |
| Sat - 12/01/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 58.13 | 2,182.37 | 182.80 | 2,365.17 |
| Sun - 12/02/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 6.45 | 700.50 | 58.10 | 758.60 |
| Mon - 12/03/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 23.11 | 1,128.89 | 94.61 | 1,223.50 |
| Tue - 12/04/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 36.10 | 1,320.90 | 110.62 | 1,431.52 |
| Wed - 12/05/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 23.10 | 945.85 | 74.41 | 1,020.26 |
| Thu - 12/06/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |

| | | | | | |
|------------------|------------|-----------|----------|----------|------------|
| | | 26.55 | 1,509.45 | 126.42 | 1,635.87 |
| Fri - 12/07/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 2.35 | 843.65 | 70.70 | 914.35 |
| Sat - 12/08/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 34.35 | 1,989.65 | 166.63 | 2,156.28 |
| Sun - 12/09/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 79.85 | 2,218.15 | 185.81 | 2,403.96 |
| Mon - 12/10/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 27.80 | 1,006.20 | 84.25 | 1,090.45 |
| Tue - 12/11/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 31.15 | 1,421.85 | 116.99 | 1,538.84 |
| Wed - 12/12/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 30.90 | 1,680.10 | 140.73 | 1,820.83 |
| Thu - 12/13/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 50.30 | 2,197.65 | 180.67 | 2,378.32 |
| Fri - 12/14/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 40.25 | 2,076.75 | 173.92 | 2,250.67 |
| Sat - 12/15/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 84.90 | 3,191.55 | 266.75 | 3,458.30 |
| Sun - 12/16/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 23.15 | 1,389.85 | 112.35 | 1,502.20 |
| Mon - 12/17/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 69.78 | 2,536.67 | 191.84 | 2,728.51 |
| Tue - 12/18/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 68.23 | 2,872.77 | 232.69 | 3,105.46 |
| Wed - 12/19/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 199.35 | 2,789.27 | 238.57 | 3,027.84 |
| Thu - 12/20/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 59.45 | 2,722.50 | 227.48 | 2,949.98 |
| Fri - 12/21/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 108.10 | 2,751.90 | 230.50 | 2,982.40 |
| Sat - 12/22/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 218.65 | 2,056.35 | 172.30 | 2,228.65 |
| Sun - 12/23/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 5.70 | 1,294.80 | 108.48 | 1,403.28 |
| Mon - 12/24/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 174.85 | 847.15 | 71.00 | 918.15 |
| Wed - 12/26/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 8.60 | 697.40 | 58.41 | 755.81 |
| Thu - 12/27/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 11.75 | 750.25 | 62.86 | 813.11 |
| Fri - 12/28/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 14.70 | 763.30 | 63.95 | 827.25 |
| Sat - 12/29/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 18.55 | 904.45 | 75.73 | 980.18 |
| Sun - 12/30/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 6.45 | 838.55 | 70.23 | 908.78 |
| Mon - 12/31/2007 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |

| | | | | |
|-------|----------|------------|-----------|------------|
| | 19.80 | 597.94 | 50.07 | 648.01 |
| 4,272 | 6,787.39 | 207,339.85 | 17,077.92 | 224,417.77 |

| | | | | | |
|---------------------|--------------|-----------------|-------------------|------------------|-------------------|
| <u>Grand Totals</u> | <u>4,272</u> | <u>6,787.39</u> | <u>207,339.85</u> | <u>17,077.92</u> | <u>224,417.77</u> |
|---------------------|--------------|-----------------|-------------------|------------------|-------------------|

Daily Sales by Store

1/1/2008 - 1/31/2008

2 - Kolo Soho

| | | | | | |
|------------------|------------|-----------|----------|----------|------------|
| Wed - 01/02/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 36.30 | 553.20 | 46.29 | 599.49 |
| Thu - 01/03/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 21.05 | 587.90 | 39.00 | 626.90 |
| Fri - 01/04/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 46.40 | 1,919.60 | 160.81 | 2,080.41 |
| Sat - 01/05/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 14.95 | 802.55 | 67.22 | 869.77 |
| Sun - 01/06/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 21.45 | 1,025.55 | 85.88 | 1,111.43 |
| Mon - 01/07/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 10.55 | 974.06 | 78.74 | 1,052.80 |
| Tue - 01/08/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 0.00 | 323.00 | 27.03 | 350.03 |
| Wed - 01/09/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 72.35 | 1,060.65 | 88.82 | 1,149.47 |
| Thu - 01/10/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 9.05 | 386.95 | 32.42 | 419.37 |
| Fri - 01/11/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 37.70 | 735.30 | 61.60 | 796.90 |
| Sat - 01/12/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 49.03 | 1,282.47 | 107.41 | 1,389.88 |
| Sun - 01/13/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 18.30 | 977.70 | 81.91 | 1,059.61 |
| Mon - 01/14/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 34.50 | 721.50 | 60.44 | 781.94 |
| Tue - 01/15/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 35.70 | 1,663.20 | 113.03 | 1,776.23 |
| Wed - 01/16/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 51.20 | 1,270.80 | 106.42 | 1,377.22 |
| Thu - 01/17/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 3.90 | 268.10 | 22.44 | 290.54 |
| Fri - 01/18/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 12.15 | 681.85 | 57.12 | 738.97 |
| Sat - 01/19/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 76.55 | 1,247.45 | 104.47 | 1,351.92 |
| Sun - 01/20/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 15.25 | 1,621.75 | 135.82 | 1,757.57 |
| Mon - 01/21/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 12.00 | 897.00 | 75.14 | 972.14 |
| Tue - 01/22/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 5.75 | 582.20 | 48.20 | 630.40 |
| Wed - 01/23/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 10.00 | 152.00 | 12.74 | 164.74 |

| Thu - 01/24/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
|---------------------|------------|---------------|------------------|-----------------|------------------|
| | | 5.45 | 352.55 | 29.53 | 382.08 |
| Fri - 01/25/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 25.15 | 906.85 | 75.97 | 982.82 |
| Sat - 01/26/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 37.30 | 1,051.70 | 79.71 | 1,131.41 |
| Sun - 01/27/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 15.05 | 850.95 | 71.28 | 922.23 |
| Mon - 01/28/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 28.10 | 723.85 | 60.06 | 783.91 |
| Tue - 01/29/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 12.00 | 633.00 | 53.02 | 686.02 |
| Wed - 01/30/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 11.15 | 395.85 | 33.19 | 429.04 |
| Thu - 01/31/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 20.35 | 1,008.65 | 72.56 | 1,081.21 |
| | 516 | 748.68 | 25,658.18 | 2,088.27 | 27,746.45 |
| Grand Totals | 516 | 748.68 | 25,658.18 | 2,088.27 | 27,746.45 |

Daily Sales by Store

2/1/2008 - 2/10/2008

2 - Kolo Soho

| Fri - 02/01/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
|------------------|------------|-----------|----------|----------|------------|
| | | 12.50 | 82.50 | 6.92 | 89.42 |
| Sat - 02/02/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 16.45 | 897.55 | 75.20 | 972.75 |
| Sun - 02/03/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 0.00 | 544.00 | 45.59 | 589.59 |
| Mon - 02/04/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 59.75 | 1,844.20 | 153.90 | 1,998.10 |
| Tue - 02/05/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | -5.00 | 361.00 | 29.38 | 380.38 |
| Wed - 02/06/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 38.44 | 1,177.76 | 98.05 | 1,275.81 |
| Thu - 02/07/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 4.80 | 807.70 | 67.66 | 875.36 |
| Fri - 02/08/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 24.75 | 1,356.20 | 113.04 | 1,469.24 |
| Sat - 02/09/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 20.75 | 672.25 | 56.31 | 728.56 |
| Sun - 02/10/2008 | # of Trans | Sale Disc | Subtotal | Sale Tax | Sale Total |
| | | 5.50 | 561.50 | 47.03 | 608.53 |
| | 152 | 177.94 | 8,294.66 | 693.08 | 8,987.74 |
| Grand Totals | 152 | 177.94 | 8,294.66 | 693.08 | 8,987.74 |

EXHIBIT G

O'CONNELL, FLAHERTY & ATTMORE, L.L.C.

ATTORNEYS AT LAW

280 TRUMBULL STREET

HARTFORD, CONNECTICUT 06103-3598

TELEPHONE (860) 548-1300

FACSIMILE (860) 548-0023

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OTHER OFFICES

1350 MAIN STREET, SPRINGFIELD, MA 01103

22 MAIN STREET, MOOSUP, CT 06354

50 NEWTOWN ROAD, DANBURY, CT 06810

65 LASALLE ROAD, WEST HARTFORD, CT 06107

MICHAEL D. O'CONNELL
E-Mail: MOCONNELL@OPALAW.COM

November 7, 2007

Via Facsimile No. 212.977.5133

John A. Golieb
Muehnick, Golieb and Golieb, P.C.
200 Park Avenue South
Suite 1700
New York, NY 10003

Re: Kolo Retail, LLC/Kate's Paperie LTD

Dear Attorney Golieb:

As you are aware, I represent Kolo Retail, LLC ("Kolo"), in connection with its dealings with Kate's Paperie, LTD. Please be advised that until the existing differences between the parties are resolved, Kolo will transmit its monthly rental payments for the Spring Street shop to our firm, to be held in escrow. Upon receipt of each payment, I will forward you a copy of the rental check so there is no confusion as to the timeliness of the payments. Enclosed is a copy of the check for the November 2007 rent. Please contact me as soon as possible if you have any issues or concerns with this arrangement. Thank you.

Very Truly Yours,

**O'CONNELL, FLAHERTY
& ATTMORE, L.L.C.**

Michael D. O'Connell

cc: Keith Werner

Enclosure

KP 0122

1653

KOLO RETAIL LLC (STORE)241 ASYLUM ST., 6TH FLOOR
HARTFORD, CT 06103SOVEREIGN BANK
6-7515-110

November 01, 2007

PAY O'CONNELL, FLAHERTY & ATTMORE, LLC
TO THE ORDER OF Two thousand eight hundred twelve and 50 / 100 Dollars

DATE

*****2,812.50
AMOUNT

O'CONNELL, FLAHERTY & ATTMORE, LLC
280 Trumbull Street
Hartford, CT 06103-3598
USA

Escrow
Kate's Paperie Ltd

⑈001653⑈ ⑆011075150⑆ 50104946186⑈

KOLO RETAIL LLC (STORE)

1653

VENDOR: O'CONNELL
REMIT TO: O'CONNELL, FLAHERTY & ATTMORE, LLC

CHECK: 0000001653
COMMENT:

DATE: 11/1/2007

| INVOICE | DATE | INVOICE NUMBER | COMMENT | AMOUNT | DISCOUNT | TOTAL AMOUNT |
|--------------|-----------|----------------|--------------------------------------|----------|----------|--------------|
| Escrow 11/07 | 11/1/2007 | 0000001235 | Escrow 11/07 Rent—Kate's Paperie LTD | 2,812.50 | 0.00 | 2,812.50 |
| TOTALS | | | | 2,812.50 | 0.00 | 2,812.50 |

KP 0123

EXHIBIT H

1
2 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3 - - - - -x
KOLO, LLC,

4
5 Plaintiff,

6 -v-

Index No.
07 Civ. 10653
(CM)

7 KATE'S PAPERIE, LTD.,

8 Defendant.

9
10
11 DEPOSITION of KEITH WERNER, taken by
12 Defendant, at the offices of Goldberg Segalla, 111
13 John Street, New York, New York, pursuant to
14 Order, on February 12, 2008, commencing at 10:10
15 a.m., before Jeffrey Benz, a Certified Realtime
16 Reporter, Registered Merit Reporter and Notary
17 Public within and for the State of New York.
18
19
20
21
22
23
24
25

| | |
|---|--|
| <p style="text-align: right;">Page 2</p> <p>1</p> <p>2 APPEARANCES:</p> <p>3</p> <p>4 GOLDBERG SEGALLA LLP</p> <p>5 Attorneys for Plaintiff</p> <p>6 170 Hamilton Avenue</p> <p>7 White Plains, New York 10601-1717</p> <p>8 BY: ROBERT VARGA, ESQ.</p> <p>9</p> <p>10 KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP</p> <p>11 Attorneys for Defendant</p> <p>12 599 Lexington Avenue</p> <p>13 New York, New York 10022-6030</p> <p>14 BY: DAVID S. VERSFELT, ESQ.</p> <p>15 ELIZABETH M. HARRIS, ESQ.</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> | <p style="text-align: right;">Page 4</p> <p>1 Werner</p> <p>2 KEITH WERNER,</p> <p>3 called as a witness, having been first</p> <p>4 duly sworn by Jeffrey Benz, a Notary</p> <p>5 Public within and for the State of New</p> <p>6 York, was examined and testified as</p> <p>7 follows:</p> <p>8 EXAMINATION BY MR. VERSFELT:</p> <p>9 Q. Mr. Werner, let's start with some</p> <p>10 background questions. What's your business</p> <p>11 address at this time?</p> <p>12 A. 241 Asylum Street, Hartford,</p> <p>13 Connecticut.</p> <p>14 Q. And has that been your business address</p> <p>15 since, say, January of 2007?</p> <p>16 A. Yes.</p> <p>17 Q. And is that business address for Kolo,</p> <p>18 the company Kolo?</p> <p>19 A. Yes.</p> <p>20 Q. Kolo Retail, LLC?</p> <p>21 A. Yes.</p> <p>22 Q. Any other -- are there any other</p> <p>23 iterations of the company of Kolo?</p> <p>24 A. Can you rephrase?</p> <p>25 Q. Yeah.</p> |
| <p style="text-align: right;">Page 3</p> <p>1</p> <p>2 IT IS HEREBY STIPULATED AND AGREED by and</p> <p>3 between the attorneys for the respective parties</p> <p>4 herein that filing and sealing be and the same are</p> <p>5 hereby waived.</p> <p>6 IT IS FURTHER STIPULATED AND AGREED that all</p> <p>7 objections, except as to the form of the question,</p> <p>8 shall be reserved to the time of the trial.</p> <p>9 IT IS FURTHER STIPULATED AND AGREED that the</p> <p>10 within deposition may be signed and sworn to</p> <p>11 before any officer authorized to administer an</p> <p>12 oath with the same force and effect as if signed</p> <p>13 and sworn to before the Court.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> | <p style="text-align: right;">Page 5</p> <p>1 Werner</p> <p>2 MR. VARGA: Sorry, I didn't understand</p> <p>3 that either.</p> <p>4 Q. Okay. There -- how many companies or</p> <p>5 LLCs are there in the Kolo family of enterprises?</p> <p>6 A. Three, altogether.</p> <p>7 Q. And what are they?</p> <p>8 A. Kolo, LLC, Kolo Retail, LLC, and Kolo</p> <p>9 International, Ltd.</p> <p>10 Q. Okay. And what is the scope of the</p> <p>11 operations of Kolo International, Ltd.?</p> <p>12 A. Kolo International sells to</p> <p>13 international retailers, anything outside North</p> <p>14 America.</p> <p>15 Q. And Kolo Retail, LLC?</p> <p>16 A. Kolo Retail sells direct to consumers.</p> <p>17 Q. And Kolo, LLC?</p> <p>18 A. Kolo, LLC is the parent company that</p> <p>19 sells directly to retailers in North America.</p> <p>20 Q. Does Kolo, LLC own Kolo Retail, LLC?</p> <p>21 A. Yes.</p> <p>22 Q. Hundred percent ownership?</p> <p>23 A. Yes.</p> <p>24 Q. And do you have a position at Kolo</p> <p>25 Retail, LLC?</p> |

Page 6

1 Werner
2 A. Yes. I do.
3 Q. And what is that?
4 A. President.
5 Q. And do you have a position at Kolo, LLC,
6 the parent?
7 A. Yes, I do.
8 Q. And what is that?
9 A. President.
10 Q. So you're -- and first, with regard to
11 Kolo International, Ltd., do you have a position
12 with that entity?
13 A. No.
14 Q. What's the ownership structure of Kolo
15 International, Ltd.? Who owns it?
16 A. It's a wholly owned sub of Kolo, LLC.
17 Q. I see. As president of Kolo, LLC,
18 you're in a position to be aware of the operations
19 and activities of Kolo International, Ltd., right?
20 A. Yes.
21 Q. For how long have you been president of
22 Kolo Retail, LLC?
23 A. Approximately two years.
24 Q. What years would that be?
25 A. That would be 2000 -- mid year 2006,

Page 7

1 Werner
2 approximately, through today.
3 MR. VARGA: Sorry, is that Kolo Retail
4 or just Kolo?
5 MR. VERSFELT: This was Kolo Retail.
6 A. Uh-huh.
7 Q. And for how long have you been president
8 of Kolo, LLC?
9 A. As of January 1, 2008.
10 Q. Okay. When did you start your
11 employment with Kolo Retail, LLC?
12 A. Since the inception.
13 Q. When was that?
14 A. I think it's been four years now.
15 Approximately four years. I don't know the
16 specific date of the incorporation, but from the
17 inception of when we incorporated.
18 Q. And when you say we, who do you refer
19 to?
20 A. Kolo, LLC.
21 Q. Were you employed at Kolo, LLC before
22 Kolo Retail was incorporated?
23 A. Yes.
24 Q. How long had you been with Kolo, LLC?
25 A. Since 1998.

Page 8

1 Werner
2 Q. And at what position did you start with
3 Kolo, LLC?
4 A. Executive vice president.
5 Q. Okay. All right. Give me a brief
6 sketch of your schooling, please.
7 A. I graduated from the University of
8 Massachusetts.
9 Q. What year?
10 A. I think it was 1985.
11 Q. You're not sure what class you graduated
12 in?
13 A. Not necessarily.
14 Q. What do you mean, not necessarily?
15 A. I don't remember.
16 Q. Well, do you go back to alumni events?
17 A. No.
18 Q. You really don't remember what class you
19 were in when you graduated from college?
20 A. I really don't.
21 Q. Do you remember your birth date?
22 A. Yes.
23 Q. Okay, what was that?
24 A. 9/13/62.
25 Q. What did you major in at the University

Page 9

1 Werner
2 of Massachusetts?
3 A. Psychology.
4 Q. Any where did you go to high school,
5 Mr. Werner?
6 A. William Howard Taft, in Woodland Hills,
7 California.
8 Q. Did you grow up in California?
9 A. Partly.
10 Q. Which part?
11 A. The latter part.
12 Q. What years?
13 A. 1977 through approximately 1982.
14 I graduated high school in 1980.
15 Q. Okay. And what were you doing during
16 the fall immediately after your graduation from
17 high school?
18 A. I don't recall.
19 Q. Did you go immediately to college?
20 A. Yes.
21 Q. What college?
22 A. Santa Barbara.
23 Q. Is that the full name?
24 A. Santa Barbara College, yes.
25 Q. Is that located in Santa Barbara?

3 (Pages 6 to 9)

Page 10

Page 12

1 Werner
2 A. Yes.
3 Q. What were you majoring in?
4 A. Psychology.
5 Q. For how long were you at Santa Barbara
6 College?
7 A. Approximately two years.
8 Q. Did you complete two years of study
9 there?
10 A. Yes, I did.
11 Q. Did you take courses in addition to
12 psychology courses?
13 A. Yes, I did.
14 Q. Take any business courses?
15 A. Yes, I did.
16 Q. Which ones?
17 A. Business law.
18 MR. VARGA: I'm sorry?
19 THE WITNESS: Business law.
20 A. There might have been a marketing
21 course, I think I took.
22 Q. Okay. Was Santa Barbara College a
23 two-year institution or a four-year institution?
24 A. I think it was two-year.
25 Not sure, but I think it was two-year.

1 Werner
2 of Massachusetts?
3 A. I believe it was two years.
4 Q. You got two years of credit.
5 A. Yes.
6 Q. So you would have started at the
7 University of Massachusetts as a junior.
8 A. Yes, that's true.
9 Q. So you spent two years at the University
10 of Massachusetts.
11 A. Yes.
12 Q. And would those -- would those year
13 terms have been from September of '82 to May of
14 '83, and September '83 to May of '84?
15 MR. VARGA: Objection to form.
16 Q. You can answer.
17 A. I think it was, but I'm thinking that
18 there was an extra semester there, and I graduated
19 in -- actually, my last semester was at the
20 University of London. That's what's throwing me
21 off with the dates. Okay.
22 Q. When would -- when would that have
23 occurred, your semester at the University of
24 London?
25 A. I believe it was the September of 1985.

Page 11

Page 13

1 Werner
2 Q. Okay. So did you get a degree from
3 Santa Barbara College?
4 A. I believe I did.
5 Q. Okay. What is the degree called?
6 A. I think it's an associate's.
7 Q. Okay. And would that have been in May
8 of 1982?
9 A. Approximately, yes.
10 Q. Was the business law course that you
11 took a one-semester course?
12 A. Yes.
13 Q. And the marketing course?
14 A. One semester course.
15 Q. So, did you -- well, what did you do
16 after your two-year stint at Santa Barbara
17 College?
18 A. What did I do in education?
19 Q. Yes.
20 A. I went to University of Massachusetts.
21 Q. Okay. Did you start as a freshman or as
22 a sophomore?
23 A. I believe it was a sophomore.
24 Q. So you got one year of credit for your
25 Santa Barbara Associate's Degree at the University

1 Werner
2 Q. Okay. Now, when you went to the
3 University of London, did you already have a
4 degree from the University of Massachusetts?
5 A. No, I did not.
6 Q. Okay. What did you study at the
7 University of Massachusetts?
8 A. Psychology.
9 Q. And what else?
10 A. Course -- you're asking about the
11 courses, specifically?
12 Q. Yes.
13 A. Okay, so I've taken statistics, all of
14 the psychology requirements, general education,
15 those were the general courses.
16 Q. Any business courses while at the
17 University of Massachusetts?
18 A. Not at the University of Massachusetts,
19 no.
20 Q. Okay. Any marketing courses while
21 there?
22 A. No.
23 Q. How about at the University of London?
24 What did you -- what was your course of study
25 while there?

Page 14

Werner

A. I was studying psychology. I had to take an art course. I had to take -- I was involved in a course, metallurgy.

MR. VARGA: As in dealing with metal?

THE WITNESS: It was a requirement, science requirement.

A. That's as much as I can recall right now.

Q. Okay. So did you get your degree from the University of Massachusetts in the early part of 1985?

A. I believe it was.

Q. So this all refreshes your recollection that you graduated in 1985?

A. Yes.

Q. Armed with your new degree, did you --

A. Can I clarify something?

Q. Of course. Let me say for the record, you can always clarify something.

A. I went through ceremony in the summer, or the May of 1984, and then finished courses at the end of December 1985. That's why it's -- I can't recall exactly when the degree was. But that's more or less the chronology of it.

Page 15

Werner

MR. VARGA: So you had the -- the degree ceremony, so to speak, the graduation, before you actually finished.

THE WITNESS: Yes, yeah, yeah.

Q. How did you manage that?

A. I don't know.

Q. Did they give you the degree at your May of 1984 ceremony?

A. I don't think they did, actually.

Q. Okay. Was it a last-minute decision not to give you a degree?

A. No. No.

Q. Okay.

Now, in our chronology, we're going through your educational background, you're armed with a degree from the University of Massachusetts, it's in or around the beginning of 1985. Did you continue -- my question is, did you continue your education?

A. Yes.

Q. And where did you go?

A. I've taken -- I've taken a course at Harvard.

Q. The executive continuing education

Page 16

Werner

program?

A. Yes.

Q. And could you briefly describe that.

A. That was advanced financial analysis.

Q. A rigorous program, I assume.

A. Yeah. Yes.

Q. For how long is the course of study?

A. This was only for one semester.

Q. Okay. And when was that?

A. I'm not -- I'm not sure. I want to say it had to be sometime between 1989 and 1990, something like that. I'm sorry. I don't recall.

Q. And have you had any other continuing educational initiatives since then?

A. No.

Q. Okay. Now, in terms of your -- have you ever taught a course in connection with any educational institution?

A. No.

Q. Okay. Now, then, in terms of your work history, when did you start working a full-time job after September -- I'm sorry, after January of 1985?

A. I think it was right after, or -- maybe

Page 17

Werner

three months, somewhere in April of 1986.

Q. Where was that?

A. That was in Los Angeles, working for a mortgage banking company.

Q. What did you do at that mortgage banking company?

A. Originate and underwrite loans.

Q. What was the name of the company?

A. Cort Financial, C-O-R-T.

Q. In connection with your originating and underwriting mortgage loans, did you work with the paperwork requirements for mortgage lending?

A. Can you rephrase that?

Q. Okay. Did you work with the federal paperwork requirements in connection with the mortgage loans that you originated and underwrote while at Cort Financial?

A. No, that --

MR. VARGA: Objection to form.

A. No.

Q. You are aware, aren't you, that there are federal forms for Fannie Mae or Ginnie Mae qualifying mortgages?

A. I'll clarify. Yes. Yes, I did.

5 (Pages 14 to 17)

Page 18

1 Werner
2 Q. You did work with those paperwork
3 requirements.
4 A. Yes.
5 Q. So you understood while at Cort
6 Financial that the paperwork could be a critical
7 component of a mortgage loan.
8 A. Absolutely.
9 Q. For how long were you at Cort Financial?
10 A. I want to say almost two years.
11 Q. So that would be approximately April '86
12 till when?
13 A. To sometime in '88.
14 Q. And did you leave Cort Financial at that
15 time?
16 A. Yes, at this time.
17 Q. Why?
18 A. I was hired -- I was offered a job at
19 another company.
20 Q. Which company?
21 A. This was Fred Sands Realtors.
22 Q. Could you spell that?
23 A. Yes, Fred, F-R-E-D, last name is
24 S-A-N-D-S, realtor.
25 Q. Where was Fred Sands Realtor located, in

Page 20

1 Werner
2 you originated?
3 A. Rephrase, I'm sorry.
4 Q. Okay. While you were at Cort Financial,
5 you originated loans. As you pushed through the
6 documentation on those loans, did Cort Financial
7 have policies as to what you should do with those
8 documents?
9 A. Yes.
10 Q. They would -- and did those policies
11 instill in you a respect for keeping the documents
12 of the mortgage loans that you originated?
13 MR. VARGA: Objection to form.
14 A. We were not to lose documents.
15 Q. Right. Okay. And the same would be
16 true at Fred Sands Realtor, correct?
17 A. Correct.
18 Q. That -- where it's a contract on a
19 mortgage, and the parties might later want to go
20 back and see what the terms were, you have to keep
21 the documents, right?
22 A. I was not involved with the signing of
23 mortgages. Just the origination, and
24 applications, that you were referring to.
25 Q. And the applications are part of the

Page 19

1 Werner
2 1988?
3 A. Los Angeles.
4 Q. Still in L.A.
5 A. Yeah.
6 Q. And what were you doing while there?
7 A. I worked for their mortgage subsidiary.
8 Originating, again.
9 Q. The same type of work you had done for
10 Cort Financial?
11 A. Very similar.
12 Q. With similar requirements with respect
13 to paperwork and mortgages?
14 A. Yes.
15 Q. And similar understanding on your part
16 of paperwork in connection with mortgages?
17 MR. VARGA: Objection to form.
18 A. Yes.
19 Q. Okay.
20 I mean, a mortgage is a contract, right?
21 A. Mortgage -- the mortgage document, yes.
22 Q. Okay.
23 Did Cort Financial have a -- have
24 requirements for the organization and preservation
25 of the documents in connection with the loans that

Page 21

1 Werner
2 mortgage file, are they not?
3 A. Yes, they are.
4 Q. And a realtor company underwriting
5 mortgages is careful to keep the mortgage file so
6 that it can be referred to later.
7 A. Correct, but I wasn't involved with the
8 processing.
9 Q. All right, but you understood that the
10 mortgage file was an important part of the
11 mortgage itself?
12 A. Yes.
13 Q. Okay.
14 And you understood the significance
15 attached to keeping that paperwork.
16 A. Yes.
17 Q. Okay. Now, after Fred Sands Realtor --
18 well, how long were you at Fred Sands Realtor in
19 Los Angeles?
20 A. Less than a year.
21 Q. And where did you go from there?
22 A. I opened up my own company.
23 Q. And what was the name of that company?
24 Tell me a little bit about that company, please.
25 A. Werner & Company.

Page 22

1 Werner
2 MR. VARGA: Objection to form.
3 Q. Let me rephrase it.
4 Please tell me the name of that company.
5 A. Werner & Company.
6 Q. And what did Werner & Company do?
7 A. We managed assets, mostly real estate,
8 and we were involved with turning around
9 nonperforming assets.
10 Q. Any particular types of nonperforming
11 assets?
12 A. It would include real estate, mostly,
13 but at times other businesses that were related to
14 the client.
15 Q. How many employees at Werner & Company?
16 A. At which time?
17 Q. When you opened up the company.
18 A. Just two.
19 Q. You and?
20 A. One other person.
21 Q. In what capacity?
22 What capacity did that other person have
23 at the company?
24 A. Oh. Mostly in sales.
25 Q. You did have a title at Werner & Company

Page 24

1 Werner
2 Or did you separate from the company?
3 A. I did not.
4 Q. Are you still a principal at Werner &
5 Company?
6 A. I am.
7 Q. And how many employees does the company
8 have now?
9 A. Just one.
10 Q. Who is that?
11 A. I'm sorry, two. Myself and one other
12 person.
13 Q. Are you still the president?
14 A. Yes.
15 Q. And is the other person still in sales?
16 A. No.
17 Q. What does the other person do now?
18 A. Manage day-to-day operations of
19 properties.
20 Q. And what dollar value of real estate
21 assets are under your management today?
22 A. Just for clarification, are you asking
23 third-party assets, third-party managed assets, or
24 in total?
25 Q. In total.

Page 23

1 Werner
2 when you opened it?
3 A. I did.
4 Q. What was that?
5 A. President.
6 Q. Okay. Can you give with me an idea of
7 what the dollar value was of the assets that you
8 were managing, at the time?
9 A. Are you asking about the beginning or
10 when -- at what point in time?
11 Q. First the beginning.
12 A. The beginning was zero.
13 Q. Okay. What did it ultimately get up to?
14 A. Somewhere in the neighborhood of about 5
15 to 7 million.
16 Q. When you reached 5 to 7 million, in
17 assets under management, at Werner & Company,
18 about what time would that have been? About what
19 date would that have been?
20 A. I think it was around 1994 or '95,
21 somewhere in there.
22 Q. Okay. Did you leave Werner & Company in
23 the time frame of 1994 to 1995?
24 A. No.
25 Q. How did you separate from the company?

Page 25

1 Werner
2 A. In total.
3 About 4 million.
4 Q. And what about third-party managed
5 assets?
6 A. Zero.
7 Q. Of the 5 to 7 million in the 1994 to '95
8 period that you mentioned, what proportion would
9 have been third-party managed assets?
10 A. Almost a hundred percent.
11 Q. Did you have contracts with those third
12 parties who were managing real estate?
13 A. Yes.
14 Q. Okay. Who negotiated those contracts?
15 A. At times I would.
16 Q. Who would negotiate them if you were not
17 the person negotiating for your --
18 A. The salesperson I mentioned.
19 Q. Okay. Did you negotiate the larger
20 contracts, typically?
21 A. Not necessarily by size, no.
22 Q. The more important contracts?
23 A. Not necessarily. It was just a
24 relationship decision.
25 Q. Okay. And when you had negotiated a

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Werner

1 contract and the contract had been executed by the
2 parties, what would you do with it?

3 A. The paperwork?

4 Q. Yes.

5 A. It would be retained within the company.

6 Q. Okay.

7 Is the other person that --

8 MR. VARGA: Can we identify him?

9 MR. VERSFELT: Pardon me?

10 MR. VARGA: Can we identify him? You're
11 referring to the other person, so we know who
12 it is.

13 MR. VERSFELT: That's the question I'm
14 about to ask.

15 Q. Who was the other person, I was going to
16 say, the other person that we've been talking
17 about? Can you identify who it is?

18 A. Currently, are you asking?

19 Q. Well, I'm going to ask you throughout,
20 so if it changed, feel free to tell me.

21 A. Yes, it did, and the person -- would you
22 like the name of the person?

23 Q. I think Mr. Varga wants the name. So do
24 I.

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Werner

1 open it originally in Hartford?

2 A. No, actually, I did not.

3 Q. Where did you found the company? Tell
4 me.

5 A. West Hartford.

6 There's a distinction.

7 Q. What is that distinction?

8 A. The distinction is that Hartford is the
9 downtown district, the city, and then there was
10 the suburbs, which are West Hartford.

11 Q. Okay, so to clarify, when you first
12 opened Werner & Company, you opened the company in
13 West Hartford, correct?

14 A. Correct.

15 Q. And that was what year, again?

16 A. I think it was 1989.

17 Q. Now, you had been in Los Angeles prior
18 to that.

19 A. Yes.

20 Q. But you moved to West Hartford.

21 A. Uh-huh.

22 Q. Was there a reason for that?

23 A. I wanted to live there.

24 Q. Okay. When did you first learn of Kolo,
25

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Werner

1 MR. VARGA: Because we kept referring to
2 the other person.

3 A. The woman that worked for me at the
4 beginning of the company was Tammy Potter.

5 MR. VARGA: Potter?

6 THE WITNESS: Potter, P-O-T-T-E-R.

7 MR. VARGA: Is that two "M"s, Tammy?

8 THE WITNESS: I believe it is, yeah.

9 Q. And at some point, Tammy Potter left the
10 company.

11 A. Yes.

12 Q. And another person came in to be the
13 second person at Werner & Company?

14 A. Yes, but between then and now we've had
15 several other employees.

16 Q. Fair enough. Who is it now?

17 A. The name of the person is Althea,
18 A-L-T-H-E-A, Brown.

19 Q. Okay. Where is Werner & Company
20 incorporated, do you know?

21 A. Connecticut.

22 Q. And is -- where is it headquartered?

23 A. In Hartford.

24 Q. When you opened the company, did you
25

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Werner

1 LLC?

2 A. Learn of Kolo. I was actually brought
3 Kolo as a concept, as a market plan -- in a
4 marketing plan, in 1998. I think it was the
5 beginning of 1998.

6 Q. You were brought a marketing plan by
7 whom?

8 A. By Peter Dunn.

9 Q. And you were at the time still -- you
10 were still president of Werner & Company.

11 A. Yes.

12 Q. And you're still president of Werner &
13 Company today.

14 A. Yes.

15 Q. What proportion of your time spent on
16 business affairs is allocated to Werner & Company,
17 would you say?

18 A. Less than 5 percent of my time.

19 Q. And is the rest with Kolo?

20 A. Yes.

21 Q. So --

22 MR. VARGA: For the record, and you said
23 the rest for Kolo. Would you clarify,
24 perhaps you can ask him, because there are
25

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1 Werner
 2 two -- three entities. Kolo. Or are we
 3 just --
 4 MR. VERSFELT: That's why I
 5 intentionally used Kolo.
 6 Q. I mean that the 95 percent of your time
 7 that is not spent on Werner & Company is spent on
 8 one or more of the Kolo entities.
 9 A. That's correct.
 10 Q. All right. How much of it is spent on
 11 Kolo, LLC?
 12 A. Currently, you're asking?
 13 Q. Yes.
 14 A. It's approximately 90 percent.
 15 Q. And how do you divide the other 10
 16 percent of this 95 percent?
 17 A. There's an allocation that we use, and
 18 that would be -- I believe it's 8 percent to
 19 Retail, and the extra 2 percent to International.
 20 Q. So that's an allocation that's applied
 21 to your time for accounting purposes?
 22 A. Not just accounting purposes.
 23 Q. What other purposes?
 24 A. Well, just for responsibility,
 25 performance issues, financial issues.

Page 31

1 Werner
 2 Q. Okay. So is it fair to say that you and
 3 Peter Dunn founded Kolo, LLC on or about 1998?
 4 A. Yes, sir.
 5 Q. And what is Peter Dunn's position at
 6 Kolo, if he has one?
 7 A. Currently he's the chief executive
 8 officer.
 9 Q. And what was he before he was -- became
 10 CEO?
 11 A. President of Kolo.
 12 Q. So he was president when you were
 13 executive vice president, he became CEO when you
 14 became president?
 15 A. Yes.
 16 Q. Okay. Was there a CEO prior to Peter
 17 Dunn, at the company?
 18 A. No.
 19 Q. You just didn't have a CEO.
 20 A. We did not.
 21 Q. So Peter Dunn has always been the senior
 22 officer of the company?
 23 A. Yes.
 24 Q. How -- okay.
 25 Now, at Werner & Company, where you

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1 Werner
 2 remain the president, do you still do turn-around
 3 work?
 4 A. No.
 5 Q. When was -- what was the last
 6 turn-around situation that you worked on with
 7 Werner & Company?
 8 A. Would you like me to describe the
 9 client, or name the client?
 10 Q. Both.
 11 MR. VARGA: To the extent there is no
 12 confidentiality issues in disclosing the
 13 client, go ahead. That would be my only
 14 concern.
 15 THE WITNESS: I don't believe there is.
 16 But thank you.
 17 A. I think the last client was Moonrise
 18 LLC. And I'm sorry, that was a family,
 19 predominantly family-owned company that was
 20 involved in developing an assisted living project.
 21 Q. Where was the project that the family
 22 was trying to develop?
 23 A. In Connecticut.
 24 Q. Where in Connecticut?
 25 A. Weathersfield, Connecticut.

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1 Werner
 2 Q. And should I assume it didn't go well
 3 for the family?
 4 A. That's right. Yes.
 5 Q. And Werner & Company came in to turn it
 6 around?
 7 MR. VARGA: Objection to the prior
 8 question.
 9 A. Yes.
 10 Q. And did you give me a time frame for
 11 this yet?
 12 A. No. I did not. I -- I think it's
 13 sometime between 1997 through 1998. It may have
 14 been the latter part of '96, I'm not sure.
 15 Q. Fair enough. Did Werner & Company take
 16 a stake in Moonrise LLC in connection with the
 17 workout?
 18 A. Yes. Yes, sir.
 19 Q. What percentage did it take?
 20 A. 30 percent.
 21 Q. Was that pursuant to a contract?
 22 A. That was -- no, that was not. No.
 23 Q. There was no writing in connection to
 24 your taking 30 percent of the company?
 25 A. Well, I believe you said contract. We

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Page 36

1 Werner
 2 went directly into an LLC with shares being
 3 distributed.
 4 Q. Okay. Was there a document reflecting
 5 the agreement of the parties to award you
 6 30 percent of an LLC?
 7 A. No.
 8 Q. No document at all?
 9 A. No document at all.
 10 Q. You kept the documentation for the LLC,
 11 right?
 12 A. Yes. The operating agreement, I believe
 13 we have, yes.
 14 Q. The operating agreement is a contract,
 15 isn't it?
 16 A. Yeah. Yes, it is.
 17 Q. And you have that.
 18 A. I believe I do.
 19 Q. Okay. When did you first hear of Kate's
 20 Paperie, Mr. Werner?
 21 MR. VARGA: I'm sorry, what was the
 22 question?
 23 MR. VERSFELT: Read it back.
 24 (The record was read back.)
 25 MR. VARGA: Thank you.

1 Werner
 2 Kolo.
 3 A. That's correct.
 4 Q. Okay. They do, so far as you know, they
 5 purchase Kolo products through a distributor of
 6 Kolo's?
 7 A. As far as I know, yes.
 8 Q. When did you first come to hear that
 9 Kate's Paperie was in financial difficulties?
 10 A. Formally, I heard in February.
 11 Q. Of what year?
 12 A. I'm sorry. Of 2007.
 13 Q. You say formally, how did you hear
 14 formally? What do you mean by that?
 15 A. It was notice that was sent out by
 16 Marilyn -- sorry, I don't remember the attorney's
 17 name representing Kate's. Marilyn -- she's a
 18 bankruptcy attorney.
 19 Q. Simon.
 20 A. Thank you.
 21 Q. And the notice was sent out to whom?
 22 A. I believe it was sent out to all
 23 creditors.
 24 Q. And was Kolo's a creditor of Kate's at
 25 that time?

Page 35

Page 37

1 Werner
 2 A. I believe it was sometime in 1999.
 3 Q. What did you hear at that time?
 4 A. Well, I was involved in discussions with
 5 our salespeople, who identified Kate's as a target
 6 customer for Kolo.
 7 Q. Did Kate's become a customer of Kolo's?
 8 A. In 1999, yes, I believe it did.
 9 Q. And it -- well, has it been a customer
 10 of Kolo's since?
 11 A. Yes.
 12 Q. Is it a customer of Kolo's now?
 13 A. No, it is not.
 14 Q. When did it stop being a customer of
 15 Kolo's?
 16 A. Sometime, I believe, in September of
 17 2007. But I'm not sure of the exact date.
 18 Q. But Kate's is not purchasing Kolo
 19 products at this time, that's your testimony?
 20 A. That's not true. They are purchasing
 21 Kolo products through a distributor.
 22 Q. Okay. But they are -- so when you say
 23 that they were -- started to not be a customer of
 24 Kolo's, in approximately September of 2007, what
 25 you mean is they stopped purchasing direct from

1 Werner
 2 A. Yes, we were.
 3 Q. Now, you said you heard about that
 4 formally in February of 2007. When did you first
 5 hear informally that Kate's Paperie might be in
 6 financial difficulties?
 7 A. Sometime, I think quarter -- the fourth
 8 quarter of 2006, maybe the January of 2007,
 9 somewhere in there.
 10 Q. In the weekends leading up to the formal
 11 notice.
 12 A. Yes.
 13 Q. And how did you -- well, was Kate's at
 14 the time slow paying Kolo?
 15 A. Yes. I think they were.
 16 Q. So -- okay. Now, once you got the
 17 notice from Marilyn Simon, did the notice suggest
 18 any course of action on your part?
 19 A. No.
 20 Q. Did you take any course of action in
 21 connection with the financial difficulties of
 22 Kate's Paperie, in the weeks after February of
 23 2007?
 24 A. No.
 25 Q. Did you participate on a vendor

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1 **Werner**
2 committee?
3 A. Yes.
4 Q. Tell me, when was the vendor committee
5 set up?
6 A. I don't know the exact date. It must
7 be -- it had to be between February and March of
8 2007.
9 Q. How many creditors, approximately, were
10 represented on the vendors committee?
11 A. I want to say there had to be six, maybe
12 seven, I'm not sure.
13 Q. And you were one of them.
14 A. Correct.
15 Q. You -- when I say you, there, I meant
16 Kolo.
17 A. Yes.
18 Q. But you were the representative of
19 Kolo -- strike that. You are the representative
20 of Kolo that had served on the vendor committee;
21 is that right.
22 A. Yes, as did Peter Dunn.
23 Q. Okay.
24 Well, when you say there were six or
25 seven representatives on the vendor committee, are

Page 39

1 **Werner**
2 you saying that you and Peter were two of the six
3 or seven?
4 A. No, I was -- I was referring to
5 companies.
6 Q. Okay. Six or seven companies on the
7 vendor committee, and you and Peter Dunn
8 represented Kolo on the vendor committee.
9 A. That's correct.
10 Q. How often did the vendor committee meet?
11 A. Not often. It went mostly over the
12 phone, two or three times, maybe, in April. It
13 stopped for -- between March and April sometime
14 they had two or three meetings, and then it fell
15 apart where there was nothing that the committee
16 needed to meet again on, till, I want to say,
17 September. There was a big span between the time
18 that they were meeting more frequently to the time
19 that they actually began again.
20 Q. When they were meeting more frequently
21 in March and April, what was the purpose of the
22 meetings?
23 A. To evaluate a proposal given to the
24 committee by Kate's.
25 Q. A proposal to achieve what?

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1 **Werner**
2 A. Well, what they wanted to achieve was to
3 get the vendor committee to agree to a -- a
4 reduced amount of a payoff, or some type of
5 workout, on payments, toward the balance --
6 outstanding balances.
7 Q. About what dollar value can you recall
8 the outstanding balances to have been at that
9 time?
10 A. In total?
11 Q. Yes.
12 A. Of the committee.
13 Q. Yes.
14 A. Approximately 1.9.
15 Q. Units?
16 A. Million, sorry.
17 Q. Million.
18 MR. VARGA: You have to finish the
19 sentence.
20 And Mr. Versfelt, you said, "at that
21 time," and I'm just not clear.
22 MR. VERSFELT: I meant, when I asked the
23 question, at the time of March and April of
24 2007.
25 Q. Is that how you understood the question?

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1 **Werner**
2 A. I did.
3 Q. Okay. Of that 1.9 -- strike that. Of
4 the approximately 1.9 million that Kate's owed,
5 how much did Kate's owe to Kolo's?
6 A. Approximately \$30,000.
7 Q. And that was for goods that Kate's had
8 purchased directly from Kolo.
9 A. That's correct.
10 Q. What sorts of goods does Kolo sell to
11 Kate's, or was Kolo selling to Kate's at that
12 time?
13 A. Photo albums, books, boxes, photo boxes,
14 accessories that work -- that I guess -- go with
15 the product line. Accessories like photo corners
16 and so forth.
17 Q. Okay. During this period of March and
18 April of 2007, when the vendor committee was
19 meeting, were Kate's representatives present at
20 those meetings?
21 A. There was only one meeting that I
22 remember, that Kate's attended, and that was
23 previous, I believe it was sometime between
24 February and March. All other subsequent meetings
25 of the committee, to my knowledge, was done via

11 (Pages 38 to 41)

| | |
|---|---|
| <p style="text-align: right;">Page 42</p> <p>1 Werner</p> <p>2 phone conference.</p> <p>3 Q. Okay. Who from Kate's attended the</p> <p>4 meeting that you recall, where Kate's attended the</p> <p>5 vendor committee?</p> <p>6 A. Joe -- Joe Barreiro, Leonard Flax,</p> <p>7 Lionel Flax, Lowell Flax, John Golieb, Marilyn</p> <p>8 Simon, and one of -- I forget the gentleman's</p> <p>9 name, he was the accountant for Kate's.</p> <p>10 Q. Okay. Now, what was your understanding</p> <p>11 of Joe Barreiro's role at the company at that</p> <p>12 time?</p> <p>13 A. I didn't have an understanding.</p> <p>14 Q. Did you know who he was before he walked</p> <p>15 into the meeting?</p> <p>16 A. I knew who he was, I didn't know what</p> <p>17 his position was.</p> <p>18 Q. You didn't know what his position was.</p> <p>19 By that do you mean you didn't know what his title</p> <p>20 was?</p> <p>21 A. I didn't know what his responsibilities</p> <p>22 were.</p> <p>23 Q. But you knew he was involved in the</p> <p>24 management of the company.</p> <p>25 A. Yes, yes.</p> | <p style="text-align: right;">Page 44</p> <p>1 Werner</p> <p>2 file a petition on behalf of her client as opposed</p> <p>3 to one that wouldn't.</p> <p>4 Q. So if it actually got to bankruptcy,</p> <p>5 your understanding was that Marilyn Simon would</p> <p>6 represent the bankrupt.</p> <p>7 A. Yes.</p> <p>8 Q. But if it didn't get to bankruptcy, was</p> <p>9 it your understanding that John Golieb would be</p> <p>10 the attorney?</p> <p>11 A. I didn't know.</p> <p>12 Q. But you knew that John Golieb</p> <p>13 represented the interests of Kate's?</p> <p>14 A. Yes.</p> <p>15 Q. And that's why he was there.</p> <p>16 A. Yes.</p> <p>17 Q. And Lionel Flax, you mentioned that he</p> <p>18 was there as well.</p> <p>19 A. Uh-huh.</p> <p>20 Q. Had you ever met Lionel Flax before?</p> <p>21 A. Not before that time.</p> <p>22 Q. And did you have an understanding at</p> <p>23 that time what his involvement with the company</p> <p>24 was?</p> <p>25 A. I believe in that meeting they announced</p> |
| <p style="text-align: right;">Page 43</p> <p>1 Werner</p> <p>2 Q. How about Leonard Flax?</p> <p>3 A. I didn't know how involved Leonard was</p> <p>4 obviously, I knew that he was involved with the</p> <p>5 management to some degree, and that he had an</p> <p>6 ownership interest in Kate's. But outside of</p> <p>7 that, I had no idea his involvement.</p> <p>8 Q. Okay. How about John Golieb?</p> <p>9 A. I had no idea at the time who he was.</p> <p>10 Attorney Golieb was representing them.</p> <p>11 Q. That was my next question. You knew at</p> <p>12 the time that he was an attorney representing</p> <p>13 Kate's.</p> <p>14 A. Yes.</p> <p>15 Q. And Marilyn Simon, you already mentioned</p> <p>16 to me, you knew that she was a workout attorney.</p> <p>17 A. That's correct.</p> <p>18 MR. VARGA: Bankruptcy, he mentioned</p> <p>19 before, attorney. You said workout attorney.</p> <p>20 Q. I did say workout attorney. And you</p> <p>21 said bankruptcy attorney? Do you see a</p> <p>22 difference?</p> <p>23 A. There is.</p> <p>24 Q. Explain, please.</p> <p>25 A. Well, my understanding is that she would</p> | <p style="text-align: right;">Page 45</p> <p>1 Werner</p> <p>2 that he was the president of Kate's at the time.</p> <p>3 Q. Okay. Did there come a time, at about</p> <p>4 this time -- strike that. At about this time --</p> <p>5 MR. VARGA: Which time?</p> <p>6 Q. At about the time we've been discussing,</p> <p>7 did you have a meeting with any of these</p> <p>8 individuals from Kate's, apart from the vendor</p> <p>9 committee?</p> <p>10 A. I had met with Lionel and Lowell,</p> <p>11 subsequently after we -- had the vendor</p> <p>12 committee -- the committee meeting. Yes.</p> <p>13 Q. Right. When you say subsequently, do</p> <p>14 you mean within a day or two?</p> <p>15 A. No, I'm speaking about the evening, that</p> <p>16 evening.</p> <p>17 Q. You had dinner with them?</p> <p>18 A. I believe we did, yes.</p> <p>19 Q. And what was the purpose of that dinner</p> <p>20 meeting, from your standpoint?</p> <p>21 A. Just to get to know each other.</p> <p>22 Q. Did you make a proposal to them at that</p> <p>23 business meeting?</p> <p>24 A. I did not.</p> <p>25 Q. Do you recall any of the substance of</p> |

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1 Werner
2 the discussion at that dinner?
3 A. I think it was just to get to know them,
4 what their interests were, what their experience
5 was, what their involvement was, in the company,
6 background on their mother, the beginnings of
7 Kate's, how it started.
8 Q. Okay. now, let me move into the April
9 time period. I want to focus on April 2007. Did
10 there come a time in April when you made a
11 proposal to Kate's, with regard to Kolo and Kate's
12 shops?
13 A. Yes.
14 Q. And when was that?
15 Can you narrow it down more specifically
16 than just April of 2007?
17 A. It was sometime between, I want to say
18 the 5th through the 20th of April. I think that's
19 what the dates were.
20 Q. And was the proposal that you made an
21 oral proposal?
22 A. Not at that time.
23 Q. What form did it take, then?
24 A. It was one of the exhibits we saw
25 yesterday.

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1 Werner
2 Q. Okay. We'll get to that.
3 You said it wasn't oral at that time?
4 A. It was not.
5 Q. Did you make an oral presentation at any
6 other time?
7 A. I did not.
8 Q. Okay. So you've never made an oral
9 presentation to --
10 A. No.
11 Q. -- Kate's, with regard to a Kolo
12 arrangement with Kate's shops.
13 A. Not that I can recall, no.
14 Q. So it's always been paper.
15 A. Yes.
16 Q. Okay. Well, let's go off the record.
17 (A recess was taken.)
18 Q. Mr. Werner, I want to make sure I
19 understand you correctly. I believe you just
20 testified before the break that you had not made a
21 proposal to Kate's prior to a written proposal
22 that you submitted to them in April.
23 A. That's correct.
24 Q. Did anyone else from Kolo's make a
25 proposal to Kate's, prior to your submission of a

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1 Werner
2 proposal in April?
3 A. I do not know.
4 Q. Okay. When you say you don't know, you
5 mean that it is possible that someone else from
6 Kolo made a proposal to Kate's, in the time period
7 prior to your submitting a written proposal in
8 April of 2007, correct?
9 A. Yes.
10 Q. So -- okay.
11 Now, tell me what you recall about your
12 submitting a proposal -- a written proposal to
13 Kate's, when you first did so.
14 A. It -- it preceded a meeting, and it was
15 requested by Kate's that I present them with a
16 proposal. The way that the proposal conversation
17 came up, and the shop-in-shop, was that Lionel and
18 Leonard met with Peter and I, and they had showed
19 us their idea of what the new store would be,
20 incorporate other shop-in-shops. They had a
21 diagram that they had indicated that they're
22 already interested in doing shop-in-shops. And so
23 I subsequently thereafter, and I don't know
24 exactly when, I proceeded with sending Lionel a
25 proposal, as he requested.

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1 Werner
2 Q. Okay. Let me put before you,
3 Mr. Werner, a document that was marked in a
4 deposition yesterday as Plaintiff's Exhibit 1.
5 Are there -- my question to you is, are there
6 pages in that document that constitute the
7 proposal that you submitted that you've just
8 testified about?
9 A. Yes.
10 Q. And can you describe what those pages
11 are, in that exhibit?
12 A. These pages describe the terms and
13 conditions that we were discussing with Lionel and
14 the Kate's organization.
15 Q. What pages are you --
16 MR. VARGA: He's asking --
17 Q. My question is what pages.
18 MR. VARGA: What pages.
19 A. Sorry. How do you want me to number?
20 MR. VARGA: This would be the equivalent
21 of third, and the way we described it
22 yesterday, so it would be 3, it would be --
23 the third page to the end.
24 A. So 7 -- the seventh page --
25 MR. VARGA: The -- he's asking for the

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Page 52

1 Werner
2 entire proposal.
3 A. Okay, sorry, so from 3 through 7
4 included all the terms within the proposal.
5 Q. Okay. Thank you.
6 A. Sorry, 3 through 10. I made a mistake.
7 3, 4, 5, 6, 7, 8, 9, 10, 11. Sorry, 3
8 through 11 contains the entire terms within the
9 proposal.
10 Q. That's 3 through the end of the exhibit.
11 A. Yes.
12 MR. VARGA: Plaintiff's 1.
13 Q. And to confirm, pages 3 through the end
14 constitute the proposal that you sent to Lionel,
15 Kate's, in or -- April of 2007; is that correct?
16 A. Approximately, yes. Approximately the
17 dates that you're referring to.
18 Q. Okay. What is the date on page 3 there?
19 A. April.
20 Q. April 2007.
21 A. Yes.
22 Q. Is it your testimony -- is it your
23 recollection that you would have sent it at
24 approximately the date that's on it?
25 A. Approximately in April, yes.

1 Werner
2 about?
3 A. No.
4 Q. Okay. Then you say, "I will be arriving
5 back to the U.S. this weekend." Where were you
6 when you wrote this e-mail?
7 A. Asia.
8 Q. Any particular spot in Asia?
9 A. Sorry, Hong Kong. I believe it was Hong
10 Kong. It could have been Japan, but I think it
11 was Hong Kong.
12 Q. Fair enough, and do you see in this
13 e-mail that you plan to be in the creditor meeting
14 on Monday, May 7?
15 A. That's what I said in the e-mail, yes.
16 Q. And what does your next sentence say?
17 The next sentence in the e-mail, could
18 you read it, please?
19 A. "Also, enclosed please find a draft of
20 the letter of intent."
21 Q. Okay. Now, why were you sending
22 Mr. Flax a draft of the letter of intent?
23 A. Because he requested it.
24 Q. Okay. And why did you call it a draft
25 of a letter of intent?

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1 Werner
2 Q. Okay. Fine.
3 MR. VARGA: Just a little correction,
4 you said Lionel Kate's. Lionel Flax.
5 MR. VERSFELT: Oh, I'm sorry.
6 Is that something we can correct?
7 Q. Okay. Now, let me put before you,
8 Mr. Werner, a document that was marked yesterday
9 as Plaintiff's Exhibit 9.
10 Do you have that document?
11 A. Yes, I am looking at it.
12 Q. Can you tell me what it is?
13 A. Well, Plaintiff's Exhibit 9 includes an
14 e-mail, first page is an e-mail from me to Lionel,
15 with an attachment. The attachment is Kate's
16 letter of intent. Second page is the beginning of
17 the letter of intent, which I believe is the
18 attachment to this e-mail. And the third page is
19 the final page of the letter of intent. Of KP
20 0029.
21 Q. Right. Okay. Now let's look at your
22 e-mail to Lionel, Mr. Werner, please.
23 You say, "Sorry we were unable to talk
24 again the other day." Do you recall what you were
25 talking about, or what you were unable to talk

1 Werner
2 A. Because I was giving him the opportunity
3 to review it and if he needed to change anything.
4 I was indicating that it was a draft, that it
5 wasn't a final document.
6 Q. Yeah, you didn't believe it was the
7 final document, did you?
8 A. I -- that's not true. I didn't know if
9 it would be or not.
10 Q. Did you sign it when you sent it to him?
11 A. No.
12 Q. Okay. So you expected that he would
13 consider it a draft, didn't you?
14 A. I -- I didn't expect him, I just --
15 that's a natural way I would have phrased it.
16 Q. It's a natural way, because this was the
17 first iteration of the document that he had seen,
18 correct?
19 A. It was -- the first and only.
20 Q. It was the first version of this
21 document that he had ever seen. Is that correct?
22 A. I think it is. I think it is correct.
23 I don't know for sure, but it looks like it.
24 Q. Yeah, and you called it a draft.
25 A. Uh-huh.

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1 Werner
 2 Q. Okay. Did you write it?
 3 A. Write?
 4 Q. Did you write the draft letter of intent
 5 that appears on pages KP 0028 and KP 0029?
 6 A. No.
 7 Q. Who did?
 8 A. Our attorney.
 9 Q. This was prepared by your attorney?
 10 A. Uh-huh.
 11 Q. And what's that attorney's name? Who is
 12 that?
 13 A. Paul Aparo.
 14 Q. Can you spell that, please?
 15 A. Yes, A-P-A-R-O.
 16 Q. Where does Paul Aparo practice?
 17 A. Connecticut.
 18 Q. Is he with a firm?
 19 A. He is, O'Connell Flaherty & Attmore.
 20 Q. Okay.
 21 A. I want to clarify something.
 22 Q. Okay.
 23 A. I'm not certain if he drafted it or if
 24 he read it, after I gave it to him. I really -- I
 25 have to think how it went. I don't remember if he

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1 Werner
 2 gave me the original document, and I looked at it,
 3 or if I gave him the original document to review.
 4 Q. You gave him the original document,
 5 where would you have gotten it?
 6 A. I probably have a file that was similar
 7 to the -- the form.
 8 Q. So is this draft similar to a form -- a
 9 document in a form file that you keep in your
 10 office?
 11 A. Yes.
 12 Q. Okay. Have you used that -- a form
 13 similar to this, in the past?
 14 A. Not necessarily with Kolo, and not
 15 necessarily with regard to shop-in-shop, no.
 16 Q. Can you recall when you might have used
 17 a form similar to this?
 18 A. I've used letters of intent in other
 19 business transactions such as acquisitions,
 20 before. Acquiring a company, if -- interest,
 21 something to that extent.
 22 Q. Let me ask again. Do you recall using a
 23 form similar to this, in any of those past
 24 situations?
 25 A. Yes.

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1 Werner
 2 Q. And so is it fair to say that this form
 3 is one that you had derived over time in
 4 connection with prior transactions?
 5 MR. VARGA: Objection to form.
 6 A. I don't know, to be honest with you. I
 7 just don't know if that -- if the letter of intent
 8 that we're looking at was used in any other
 9 transaction, if that's your question, I'm not -- I
 10 don't think it has been.
 11 Q. My question is this: You've testified
 12 here this morning that this letter of intent
 13 either came from you and was reviewed by Mr. Paul
 14 Aparo, or came from Mr. Paul Aparo and was
 15 reviewed by you.
 16 A. Correct.
 17 Q. You've also -- that's correct, right?
 18 A. Yes.
 19 Q. You've also testified that this draft
 20 letter of intent corresponds to the type of letter
 21 of intent that you have used in prior
 22 transactions; is that correct?
 23 A. Yes, it is.
 24 Q. Would those prior transaction have been
 25 Kolo transactions?

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1 Werner
 2 A. Not necessarily.
 3 Q. Werner & Company transactions?
 4 A. Possibly.
 5 Q. So was Mr. Paul Aparo the attorney for
 6 Werner & Company?
 7 A. Yes.
 8 Q. So it's possible -- well, let me ask it
 9 this way: Do you recall whether Mr. Paul Aparo
 10 drafted a letter of intent form similar to this
 11 draft letter of intent, in connection with prior
 12 transactions of Werner & Company?
 13 A. I don't recall.
 14 Q. Okay. If you had drafted this -- strike
 15 that.
 16 If you had prepared this draft letter of
 17 intent and then submitted it to Paul Aparo for his
 18 review, where would you have gotten the words?
 19 A. Someone might have given it to me, as a
 20 document that they were using, which I then
 21 applied to this situation.
 22 Q. Okay. And who would that someone have
 23 been?
 24 A. A party to another transaction.
 25 Q. Okay. So it's -- I take it your

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1 Werner
2 testimony is you don't recall whether or not it
3 originated with you or with Mr. Paul Aparo?
4 A. I'm sorry, I don't.
5 Q. But if it originated with you, you could
6 have cribbed, if you will, from a document you got
7 from another party.
8 MR. VARGA: Objection.
9 A. Rephrase that?
10 Q. Well, I don't mean anything derogatory
11 by the word cribbed. But -- I'll try it again.
12 MR. VARGA: Cut and paste?
13 MR. VERSFELT: Yes.
14 Q. I take it, if you had generated this
15 draft letter of intent, you might have done so by
16 cutting and pasting a form or forms of letters of
17 intent that you had obtained from prior
18 transactions, having nothing to do with Kate's.
19 A. It's possible, yes.
20 Q. Okay, but you don't remember as you look
21 at this whether you wrote it. That's your
22 testimony?
23 A. You know, as I read it, I have to tell
24 you, it -- I'm thinking that our attorney wrote
25 it, but I'm not sure. There's language in here

1 Werner
2 Q. You typed it.
3 A. Of course.
4 Q. And what did you intend Mr. Lionel Flax
5 to do with it?
6 A. Review it.
7 Q. And what do you mean when you say review
8 it?
9 A. I thought that he would review it
10 himself, and with whoever he was receiving advice
11 or counsel on, it was given to him to make sure
12 that, you know, he had a chance to understand it
13 and review it.
14 Q. Fine. And that's why, isn't it, you
15 considered it a draft?
16 A. I don't know, to be honest, and thinking
17 back, I don't know why I called it a draft, to be
18 honest with you. I just don't.
19 Q. Mr. Werner, I hope you're honest with me
20 in every answer that you give in this deposition.
21 A. And I am.
22 Q. Certainly, if someone sent you a draft
23 of a letter of intent, you would review it with
24 those you felt should see it, including your
25 lawyer, right?

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1 Werner
2 that I don't think I would have put in there, but
3 I'm not sure.
4 Q. Okay. And so you don't know whether you
5 wrote it or Mr. Paul Aparo wrote it?
6 A. Originate versus wrote it, I think we
7 probably -- we could have collaborated on it.
8 Q. What do you mean when you say you could
9 have collaborated on it?
10 A. He could have given me the original, and
11 I could have added to it, or I could have given
12 him the original -- the original, and he could
13 have changed some things in it.
14 Q. Okay, and when you say the original, if
15 you had given him the original, what you mean by
16 that is, you would have given him your
17 cut-and-paste of a prior form.
18 A. That's correct.
19 Q. Okay. Now, going back to the e-mail,
20 you called it a draft letter of intent, correct?
21 A. In the e-mail I did.
22 Q. Yes. Because it was a draft, in your
23 mind, wasn't it?
24 A. I don't think there was significance
25 behind the word draft, that I can recall.

1 Werner
2 A. Not necessarily. There are times where
3 I don't have my attorney review it. There are
4 times where I do.
5 Q. When you're talking about Werner &
6 Company?
7 A. No, no, Kolo.
8 Q. Okay. But certainly, if someone sent
9 you a document that they called a draft, you would
10 understand that to invite your comments.
11 A. I -- I guess up till today, I've never
12 really considered it a significant word to reflect
13 on. I get to change it or not. I always consider
14 any document my opportunity to change it. Draft
15 does not necessarily define that, for me.
16 Q. Okay.
17 A. Okay.
18 Q. That's fair.
19 Even if someone didn't send you a draft,
20 you would take receipt of a document as an
21 opportunity to review it, and to discuss it, if
22 there were need for such.
23 A. That's right.
24 Q. Okay. And that as you sit here, you
25 don't think you had a particular significance in

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1 Werner
2 the word draft. That's your testimony, right?
3 A. I do. Yes.
4 Q. Okay. You do?
5 A. Sorry. I do not remember having any
6 significance, using the word draft.
7 Q. Okay. Now, that was -- according to the
8 date on the e-mail, Mr. Werner, that is the first
9 page of Plaintiff's Exhibit 9, that draft letter
10 of intent went to Lionel Flax on Sunday, May 6.
11 Correct?
12 A. Yes.
13 Q. Okay. Now --
14 MR. VERSFELT: Is 30 one of the exhibits
15 here?
16 MR. VARGA: I don't know if that was
17 marked.
18 MR. VERSFELT: Well, we'll mark it now.
19 Please mark this as Defendant's A.
20 (E-mail exchange between Mr. Werner and
21 Lionel Flax, with Bates number KP 0030, was
22 marked Defendant's Exhibit A for
23 identification, as of this date.)
24 Q. I've had put before you, Mr. Werner, a
25 document that's been marked as Defendant's Exhibit

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1 Werner
2 be similar to Exhibit-- Exhibit 9.
3 MR. VARGA: Plaintiff's Exhibit 9.
4 A. Sorry, Plaintiff's Exhibit 9.
5 Q. Is it the same e-mail?
6 A. It appears that -- I would have to go
7 through word by word. It appears that it is.
8 Q. Okay. That's fair enough. I'll
9 represent to you that it is.
10 A. Okay.
11 Q. It's the same.
12 One came out of your computer and one
13 came out of our computer.
14 A. Okay.
15 Q. But the text of the e-mail itself is
16 identical. And does that refresh your
17 recollection that on Defendant's Exhibit A, the
18 e-mail that is above your e-mail, is Lionel's
19 response to your e-mail?
20 MR. VARGA: Objection to form.
21 A. Can you rephrase, please?
22 Q. Sure. When you look at Defendant's
23 Exhibit A, now, is the top e-mail from Lionel Flax
24 to you?
25 A. Yes.

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1 Werner
2 A. It's got a Bates number on it of KP 0030. Do
3 you have that document?
4 A. Yes.
5 Q. Can you tell me what it is?
6 A. It appears that this is an e-mail
7 starting from Lionel, to myself, and below that it
8 appears that there's an e-mail from Lionel -- I'm
9 sorry, from myself to Lionel.
10 Q. Yeah. Now, maybe we can shorten things
11 by comparing the e-mail on the bottom of
12 Defendant's Exhibit A with the e-mail that is on
13 Plaintiff's Exhibit 9.
14 Let me put the first page of Plaintiff's
15 Exhibit 9, let me put this before you.
16 MR. VARGA: Is it KP 0027?
17 MR. VERSFELT: Yes. And KP 0030.
18 Q. Do you see that the e-mail that is the
19 lower e-mail on Defendant's Exhibit A is the same
20 e-mail as appears on Plaintiff's Exhibit 9?
21 A. It appears that the body of this one --
22 Q. Which one?
23 A. Sorry, Exhibit A.
24 Q. Yes.
25 A. The body of my e-mail to Lionel seems to

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1 Werner
2 Q. Is it in response to the e-mail that you
3 sent to him that appears immediately below it?
4 A. I -- I don't know. It -- it looks like
5 it could be, but I don't know if it was cut and
6 pasted. What's not clear -- it doesn't seem like
7 it's a string that flows.
8 Q. Well, let's do it this way.
9 A. Okay.
10 Q. Do you see in your e-mail, it's -- you
11 can look at either exhibit, because the e-mail
12 from you is the same on both of them. We've --
13 we've established that. Now, I would like to --
14 MR. VARGA: The body of the language.
15 Q. The body of the e-mail. Yes.
16 I understand that the attachment that is
17 on Plaintiff's Exhibit 9 --
18 MR. VARGA: And also the tag, the date
19 and all that, so if you want to clarify that.
20 MR. VERSFELT: I accept that.
21 Q. The body of the typed text of the e-mail
22 is identical.
23 MR. VARGA: The message.
24 Q. Correct?
25 A. It -- it -- that's what you're saying,

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1 Werner
2 it -- yes, it looks similar. I don't know if it's
3 identical. I haven't matched it --
4 Q. Mr. Werner, do we have to take time? Do
5 you want to check every word of it? I'll take
6 time, we can take a break.
7 A. Yeah, if you would like me to.
8 Q. Fine.
9 (The witness read.)
10 Q. Are they identical?
11 A. Yes.
12 Q. Now, are you familiar with the -- the
13 fact that with e-mails, when an e-mail string
14 prints out, the earliest e-mail appears at the
15 bottom of the printed page, or -- that is, the
16 newest e-mail in a string appears first?
17 A. Yes. If you're speaking to --
18 Q. I'm asking in general.
19 A. Yes, on the screen that's true.
20 Q. And if you print out what's on the
21 screen it comes out the same.
22 A. Normally it should.
23 Q. So with that background of the identical
24 wording of your e-mail and the fact that you
25 understand that with an e-mail string, a more

1 Werner
2 for us. But to the extent you want to comfort
3 yourself that the same sentence appears in
4 Plaintiff's Exhibit 9, you may do so. Now, I
5 direct your attention to the sentence that starts,
6 Reference. Can you read that, please?
7 A. Yes. "The reference to the addendum is
8 the proposal that I had originally sent you, so if
9 you have any question about it, then you can refer
10 to the original proposal."
11 Q. Okay. Now, could you read the first
12 sentence of Mr. Lionel Flax's e-mail that appears
13 on the top of the page on Defendant's Exhibit A?
14 A. "Keith, I think you hand-delivered me
15 the proposal."
16 Q. And what does the next sentence say?
17 A. "I left it in the office and would like
18 to look at it today."
19 Q. Okay. And he goes on to say, "When you
20 get this e-mail, could you send it to me
21 electronically," right?
22 A. Yes.
23 Q. Now, do you have an understanding of
24 what the proposal is that is referred to in your
25 e-mail?

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1 Werner
2 recent e-mail prints out higher, or first, then do
3 you understand that the e-mail on the top of
4 Defendant's Exhibit A from Lionel to you is in
5 response to the e-mail that you sent to him?
6 A. I don't know if it's in response, but it
7 is after my e-mail to him, yes.
8 Q. Okay. Now, let's look at the sentence
9 in your e-mail that refers to the addendum. It's
10 about six lines down.
11 A. Okay.
12 Q. Could you read that sentence for the
13 record, please?
14 A. On Plaintiff's 9.
15 MR. VARGA: Which one?
16 Q. No, on Defendant's -- well, frankly, it
17 could be on either one, because we've established
18 that they're identical, haven't we?
19 MR. VARGA: But the line is different,
20 because the text on Plaintiff's 9 is wider,
21 so it's less line as opposed to
22 Defendant's A.
23 MR. VERSFELT: Fair enough.
24 Q. I'm looking at Defendant's A, and if you
25 want to look at that with me, it will be easier

1 Werner
2 A. An understanding of the exhibit that we
3 saw before?
4 Q. I want your understanding of what you
5 meant by the word, proposal, in your e-mail.
6 A. That was the addendum. That's what I
7 understand.
8 Q. Okay. And looking at Plaintiff's
9 Exhibit 1, can you identify the pages in that
10 that -- if any -- that constitute the proposal?
11 A. Now, again, we're looking at Plaintiff's
12 1, starting with page 3.
13 Q. And going to the end?
14 A. And going to the end.
15 Q. Fine. That's the proposal, right?
16 A. That's the addendum, yes.
17 Q. That's the addendum that is the
18 proposal.
19 A. That is the addendum that I -- that I
20 referred to as the proposal.
21 Q. Right. And did you deliver that
22 proposal to Lionel Flax electronically, after he
23 requested it in the e-mail that is at the top of
24 Defendant's Exhibit A?
25 A. I don't recall.

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1 Werner
 2 Q. Okay. Let me put before you a -- I'll
 3 have the court reporter please mark as Defendant's
 4 Exhibit B.
 5 (Document with Bates numbers KP 0031
 6 through 0041 was marked Defendant's Exhibit B
 7 for identification, as of this date.)
 8 (Discussion off the record.)
 9 Q. Mr. Werner, I've had the court reporter
 10 mark an exhibit, Defendant's Exhibit B, and place
 11 it in front of you. Have you had a chance to look
 12 that over?
 13 A. No.
 14 Q. Well, please do so.
 15 (The witness read.)
 16 MR. VARGA: Also, for the record,
 17 Defendant's B is also KP 0031 through 0041.
 18 KP 0041.
 19 MR. VERSFELT: Agreed.
 20 A. Okay.
 21 Q. Okay? You've had a chance to review it?
 22 A. Yes.
 23 Q. So you can see that this appears to be
 24 another e-mail string, right?
 25 A. It appears to be, yes.

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1 Werner
 2 Q. And this e-mail string -- wait a second.
 3 Okay. This e-mail string has the two
 4 e-mails that are set forth in Defendant's Exhibit
 5 A, plus another one up top. Is that correct?
 6 A. Yes.
 7 Q. Okay. Now, is the e-mail toward the top
 8 dated May 6, at 8:59 p.m., is that an e-mail from
 9 you?
 10 MR. VARGA: You mean in the middle of
 11 the page.
 12 Q. Well --
 13 A. It's not at the top.
 14 Q. Where would you say that? On KP 0031,
 15 on the middle of the page.
 16 A. It's not at the top. It's almost in the
 17 middle. It starts off with forwarded message.
 18 Q. Okay. We're talking about the same
 19 e-mail. Is that an e-mail from you?
 20 A. Yes, it is.
 21 Q. And what did you say in it?
 22 A. "Here's the original proposal, let me
 23 know if you want to get together tomorrow in the
 24 city."
 25 Q. Right. Now were you -- there is an

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1 Werner
 2 attachment at the very top of the exhibit page, KP
 3 0031, a -- an electronic marker for an attachment.
 4 Do you see that?
 5 A. Yes.
 6 Q. And do you see pages KP 0033 to KP 0041?
 7 A. Yes.
 8 Q. Is that the attachment?
 9 A. That's not the attachment.
 10 Q. It's not.
 11 A. No, it is not.
 12 That's not necessarily what I sent.
 13 Q. Okay. Tell me what makes you think that
 14 you didn't send that e-mail.
 15 A. Because the above reference here is from
 16 Lionel to Leonard and John Golieb, on October 3,
 17 2007. So I -- I do not believe that was my
 18 attachment. That's not indicative of what I would
 19 have expected to see.
 20 Q. Okay. On the very top, you're pointing
 21 out that it -- the entire e-mail string was
 22 forwarded on October 3, 2007.
 23 A. No. I'm not indicating that.
 24 Q. What are you indicating?
 25 A. I'm indicating up to the point of -- on

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1 Werner
 2 Defendant's Exhibit B, where it says forwarded
 3 message, from Keith Werner to Lionel, that's what
 4 I agree, that that was a string that originated
 5 below that, not above that. It had nothing to do
 6 with the above, that I can recall.
 7 Q. Oh, okay. Maybe you've clarified
 8 your -- the misunderstanding -- the
 9 miscommunication between you.
 10 Do you agree that the message you sent
 11 on May 6, 2007, the message that appears just
 12 above the middle of the page, on this exhibit, and
 13 that says, here is the original proposal, included
 14 an attachment?
 15 A. I can't tell, because the -- there is no
 16 indication that the attachment was in this e-mail.
 17 Q. Okay. Could you look at pages KP 0033
 18 through 0041.
 19 (The witness read.)
 20 Q. Have you reviewed those pages?
 21 A. I have.
 22 Q. Are those pages the original proposal
 23 that you submitted to Kate's, for a shop-in-shop
 24 at the Soho store?
 25 A. I don't know.

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1 Werner
2 I just don't know.
3 **Q. Okay. Is there anything about those**
4 **pages that makes you think they're not the**
5 **original proposal that you submitted, and that you**
6 **referred to in the e-mails that we have been**
7 **looking through in these exhibits?**
8 MR. VARGA: You can take your time to
9 compare the two.
10 A. Yeah, that's what I want to do.
11 (The witness read.)
12 THE WITNESS: See, that's different.
13 That's different. There's a -- grids here.
14 There's no grids here.
15 MR. VARGA: This -- wait. Because of
16 the printing.
17 THE WITNESS: Maybe, but maybe not, I
18 don't know.
19 MR. VARGA: Forget about the style, just
20 look at the --
21 THE WITNESS: Content?
22 MR. VARGA: Right, the substance.
23 A. Well, in this exhibit, Defendant's
24 Exhibit --
25 MR. VARGA: This one?

1 Werner
2 MR. VARGA: Here is the last one.
3 THE WITNESS: Okay.
4 A. Uh-huh, okay.
5 **Q. May I?**
6 A. Yes.
7 **Q. The quality of the photocopying on**
8 **this --**
9 MR. VARGA: K -- KP 0041.
10 **Q. -- on KP 0041, looks better on**
11 **Defendant's Exhibit A than on Plaintiff's**
12 **Exhibit 1, doesn't it?**
13 A. This looks better -- which is --
14 MR. VARGA: Plaintiff's 1.
15 A. Plaintiff's 1.
16 MR. VARGA: I would have to disagree
17 with that.
18 **Q. Well, I disagree with that, too. I**
19 **mean, this Plaintiff's 1 does not clearly show.**
20 **They are barely visible, the horizontal lines that**
21 **exist in the chart, whereas Defendant's Exhibit A**
22 **clearly shows these horizontal lines.**
23 A. But on content, there is missing numbers
24 on Defendant's Exhibit -- KP 0041, and it's hard
25 to determine whether or not those numbers are the

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1 Werner
2 THE WITNESS: Yeah.
3 A. -- B, it's unclear as to the -- the
4 numbers in this copy.
5 MR. VARGA: KP 0040.
6 A. KP 0040. I can't determine if some of
7 these numbers are identical to what is in
8 Plaintiff's 1.
9 **Q. And am I correct that what you're saying**
10 **is the quality of the photocopy is not identical?**
11 MR. VARGA: They're not the best.
12 A. They're not the best for me to determine
13 if they're identical documents, no.
14 MR. VARGA: For the record, Mr. Werner
15 previously pointed to the -- the chart in the
16 bottom right corner on KP 0040, and there are
17 several columns depicted in that chart.
18 A. Was there a question that I missed?
19 **Q. I believe so. What's your -- what**
20 **you're saying, then, is that the quality of the**
21 **photocopy on Defendant's Exhibit A is not the same**
22 **as the quality of the photocopy on Plaintiff's**
23 **Exhibit 1. Is that correct?**
24 A. Yes, it is.
25 **Q. We will use Plaintiff's Exhibit 1.**

1 Werner
2 same numbers on Plaintiff's --
3 MR. VARGA: For the record, again, he
4 was comparing the charts in the far right
5 column, and the -- the bottom portion, right
6 above the Kolo logo on KP 0041.
7 MR. VERSFELT: Right.
8 **Q. I understand. Look, I'm not going to**
9 **dicker over which photocopy is better. We'll use**
10 **Plaintiff's 1. Is that all right with you? We'll**
11 **use Plaintiff's Exhibit 1.**
12 A. Yes, that's fine.
13 **Q. Now, you sent the proposal to Lionel**
14 **Flax on May 6. Is that correct?**
15 A. According to the e-mail that was shown
16 here --
17 **Q. Yes? There are -- this --**
18 MR. VARGA: That was that.
19 **Q. The same e-mail has been shown three**
20 **times.**
21 A. On Defendant's Exhibit A, according to
22 Defendant's Exhibit A -- no, that's not it, sorry.
23 Exhibit B, I did indicate that I had
24 sent it, but I'm not certain that the attachment
25 was sent.

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1 Werner
 2 Q. You sent a proposal to him on May 6.
 3 Correct?
 4 A. No. I'm not certain of that.
 5 Q. Okay. May I see the e-mails?
 6 A. Yes.
 7 Q. Let me just check here.
 8 Okay. You sent him an e-mail on May 6
 9 at 8:59 p.m. that said, Here is the original
 10 proposal. Correct?
 11 A. That's what I wrote in the e-mail, but
 12 whether the proposal as an attachment was attached
 13 to that e-mail, I do not know.
 14 Q. So it's possible you sent an e-mail that
 15 referred to an original proposal that did not have
 16 an attachment. Is that what you're saying?
 17 A. It's possible that the attachment did
 18 not go through, yes.
 19 Q. Fair enough.
 20 Now that we got that nailed down. But
 21 you intended to send a proposal to Lionel Flax at
 22 and about that time, correct?
 23 A. No. I intended to give him the
 24 addendum, which contained the information in the
 25 proposal that he was referring to, when he said, I

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1 Werner
 2 left it in the office.
 3 Q. Right. You intended to send him the
 4 addendum that was the proposal. And can you find
 5 on this table, in any of these marked exhibits,
 6 the pages that constitute the proposal that you
 7 intended to send to him?
 8 A. This Plaintiff's --
 9 MR. VARGA: 1.
 10 A. -- 1, page starting at page 3, to the
 11 end, is what I would have intended to give him as
 12 an addendum to the LOI.
 13 Q. Good. Thank you.
 14 A. You're welcome.
 15 Q. And did you follow up with him, at or
 16 about the time of the first week in May, to
 17 determine whether he had received the proposal
 18 that you intended to send to him?
 19 A. I don't recall that.
 20 Q. Do you know whether he ever received it?
 21 A. I know that he received it because he
 22 referred to it in conversations on the phone.
 23 Q. When were those conversations?
 24 A. Sometime after May 6.
 25 Q. Okay. How much after?

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1 Werner
 2 A. I don't recall. I really don't recall.
 3 Q. Okay. Now, let me put before you, or
 4 let me ask the court reporter now to mark an
 5 exhibit as Defendant's Exhibit C.
 6 (Document with Bates stamp KP 0042 was
 7 marked Defendant's Exhibit C for
 8 identification, as of this date.)
 9 Q. So Mr. Werner, we have put before you
 10 Defendant's Exhibit C, which is a single-page
 11 Bates KP 0042. Can you tell me what that is, sir?
 12 A. This is an e-mail from myself to Lionel.
 13 Q. When is it dated?
 14 A. It's dated May 8.
 15 Q. And what do you say in the first
 16 sentence of that e-mail, sir?
 17 A. "Just checking in with you to see how
 18 you are doing with signing the LOI."
 19 Q. Okay. Now, what was the purpose of your
 20 asking after the LOI in that first sentence?
 21 A. The purpose of me asking that was to
 22 find out if he's reviewed it and if he's ready to
 23 sign it, because he had indicated to me that
 24 there's a huge urgency to get the shop-in-shop up
 25 and running by June 1.

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1 Werner
 2 Q. Right, okay. So you wanted -- you sent
 3 it to -- you sent the LOI to him on May 6,
 4 correct?
 5 A. I believe that to be true. I have to
 6 look back here on the dates. There was an
 7 attachment here in one of the exhibits that I
 8 actually -- I don't see it here. Here it is, yes,
 9 it's May 6. I sent the letter of intent to him.
 10 Q. Sunday, May 6.
 11 A. Correct.
 12 Q. Correct. Okay. So Tuesday, you're
 13 asking how he's doing with it, right?
 14 A. Correct. Tuesday, May 8, yes.
 15 Q. Now, I think this is a Plaintiff's
 16 exhibit.
 17 MR. VARGA: Which one is that? 41?
 18 MR. VERSFELT: 44, KP 44. Well, we will
 19 do it this way. We'll mark it. I'll ask the
 20 court reporter to mark as the next exhibit a
 21 document Bates-numbered KP 0044.
 22 (E-mail string, Bates-numbered KP 0044
 23 and 0045, was marked Defendant's Exhibit D
 24 for identification, as of this date.)
 25 MR. VARGA: KP 14?

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1 Werner
 2 MS. HARRIS: 44.
 3 MR. VARGA: 44.
 4 (The witness read.)
 5 MS. HARRIS: This is the signature page,
 6 KP 0045.
 7 MR. VERSFELT: What?
 8 MS. HARRIS: The signature page.
 9 MR. VERSFELT: Wait a second. Let's go
 10 back on the record. We've just determined
 11 that KP 0045 appears to be the second page of
 12 the string of e-mails that appear in KP 0044.
 13 So with Mr. Varga's permission, we're
 14 just going to staple those together so that
 15 Defendant's Exhibit D consists of a two-page
 16 e-mail string Bates-stamped KP 0044 and -45.
 17 Let's leave the stapler in here.
 18 MR. VARGA: So it's Defendant's
 19 Exhibit D is KP 0044 and KP 0045.
 20 MR. VERSFELT: Correct.
 21 **Q. Have you looked that over, Mr. Werner?**
 22 A. I have looked it over. Give me one
 23 moment. Let me just --
 24 **Q. Surely.**
 25 MR. VARGA: Take your time.

1 Werner
 2 happened to it.
 3 **Q. Now, you were surprised when he signed**
 4 **it, weren't you?**
 5 A. No, I was not.
 6 **Q. Why not?**
 7 A. Because all indications from previous
 8 conversations and e-mails told me that he had no
 9 problem with the letter of intent.
 10 **Q. And what e-mails gave you that**
 11 **suggestion?**
 12 A. Starting when?
 13 **Q. Did you produce -- did you produce**
 14 **e-mails that give you that impression?**
 15 MR. VARGA: Excuse me, counsel, but he
 16 was not finished with his answer.
 17 **Q. Finish your answer, please.**
 18 A. The e-mails I'm referring to was from
 19 the time in April, all the way through to May.
 20 I'm referring to all of the e-mail communication.
 21 **Q. Well, Mr. Werner, you've testified this**
 22 **morning that you did not discuss the shop-in-shop**
 23 **proposal with people at Kate's, that you gave them**
 24 **a written proposal.**
 25 Now, we've agonized this morning to

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1 Werner
 2 (The witness read.)
 3 A. Okay. I've looked it over.
 4 **Q. Okay. So can you tell me what this**
 5 **document is, Defendant's Exhibit D?**
 6 A. This appears to be a string of e-mails
 7 starting on May 8, where I have asked Lionel -- I
 8 was --
 9 MR. VARGA: Read the first sentence, so
 10 it identifies --
 11 A. "Just checking in with you to see how
 12 you are doing with signing the LOI."
 13 And then he proceeded to say, "I just
 14 sent this through signed." And I said, the next
 15 e-mail says, "Thank you, Lionel, I will look for
 16 it now." And then he came back, the next e-mail,
 17 on May 10, he said, "Did you find it?"
 18 MR. VARGA: Question mark.
 19 A. Question mark.
 20 **Q. Did you find it?**
 21 A. Yes.
 22 **Q. Where is it?**
 23 A. I don't know.
 24 **Q. What did you do with it?**
 25 A. I signed it and I can't determine what

1 Werner
 2 determine what the written proposal is, but I
 3 think we're all on the same page that that written
 4 proposal is pages 3 through the end of Plaintiff's
 5 Exhibit 1, correct?
 6 A. Yes.
 7 **Q. Now, is there an e-mail in the period of**
 8 **May 6 when you sent Lionel Flax the LOI, to the**
 9 **period of May 10, when we see this last e-mail on**
 10 **Defendant's Exhibit 10, when you discussed the**
 11 **substance of your proposal with Lionel Flax?**
 12 A. Within the e-mail string, there's no
 13 indication that we had talked about the substance
 14 between this 5/8/07 through 5/10 in that string of
 15 e-mails.
 16 **Q. Right. Do you have a string of e-mails**
 17 **in that time period that suggests that you did**
 18 **discuss the substance of the proposal with Lionel**
 19 **Flax in those -- in that period of time?**
 20 A. Outside of Exhibit D, Defendant's
 21 Exhibit D?
 22 **Q. Yes, sir.**
 23 A. I would have produced it if I did.
 24 **Q. Okay. I'll ask your counsel, maybe we**
 25 **can take a break.**

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Werner

1 I would like you to go through your
2 e-mails and identify it, if there is one, any
3 e-mail that suggests you discussed the substance
4 of your proposal with Lionel Flax between the time
5 of May 8, when you sent it -- I'm sorry, May 6,
6 correct that -- May 6, when you sent it to him,
7 when you sent the LOI to him, and May 10, when he
8 asked you, did you find it.

9 A. Are you only referring to e-mail
10 communication?

11 Q. You have testified this morning that you
12 did not orally discuss the proposal with him. So
13 I'm asking for e-mail confirmation, one way or the
14 other --

15 A. No, you did not ask -- excuse me,
16 counselor, you did not ask me about that. You
17 asked me about the proposal.

18 Q. Okay. Where were you on May 6?

19 A. Where was I?

20 Q. Yes.

21 A. I don't recall where I was.

22 Q. Didn't you just testify this morning
23 that you were in Hong Kong or maybe Japan.

24 A. I would have to go back in, to be honest
25

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Werner

1 record.
2

3 MR. VERSFELT: Very good. Thank you.

4 Q. Now, I'm asking you, did you have a
5 conversation with Lionel Flax between the time
6 period of May 6 and May 10? I want to know
7 whether you had an oral conversation with him.

8 A. I don't recall.

9 Q. Okay. Now I will ask you, can you point
10 to any e-mail that you produced, whether in front
11 of you on the table right now, or otherwise, that
12 will confirm that you had any discussions
13 whatsoever with Lionel Flax as to the substance of
14 your proposal during the time period of May 6 to
15 May 10, 2007?

16 MR. VARGA: Via e-mail.

17 Q. That's who I've asked. I think we've
18 just confirmed that he has no recollection of oral
19 discussions. Now I want to see if there's any
20 e-mail that might possibly refresh your
21 recollection.

22 A. Yeah. According to Defendant's
23 Exhibit D, it doesn't appear that way.

24 Q. I'm asking a broader question. I agree
25 with you, that none of the exhibits that are in

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Werner

1 with you. There was a -- an e-mail here.
2

3 MR. VARGA: Plaintiff's 9.

4 A. Uh-huh.

5 But what is your question?

6 Q. My question is, where were you on or
7 about May 6 of 2007? Where, physically, were you?

8 A. It appears that I was outside the
9 country.

10 Q. Yes, you testified this morning that you
11 were in -- you thought Hong Kong. First you
12 said --

13 MR. VARGA: Or Japan.

14 Q. Remember you said first, I was in Asia.
15 I said, Can you narrow it down? And you said you
16 thought maybe Hong Kong or maybe Japan, but you
17 were not in this country at that time. Right?

18 A. Correct.

19 Q. And do you recall when you came back?

20 A. I don't recall the date, no.

21 Q. Do you recall the e-mail that I've
22 showed you today that said you hoped to get back
23 for the May 7th vendors committee?

24 A. Yes, I see that.

25 MR. VARGA: Plaintiff's 9, for the

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Werner

1 front of you --
2

3 MR. VARGA: He's asking, basically, if
4 anything on the table --

5 MR. VERSFELT: Please, I would like to
6 finish.

7 Q. I'll submit to you, and I think you
8 agree, that none of the exhibits that we have used
9 this morning suggest that you had a conversation
10 with Lionel Flax during the period of May 6 to
11 May 10.

12 What I'm asking you now is, do you have
13 any e-mail that I have not put before you this
14 morning that suggests to you that you had a
15 conversation with Lionel Flax about the substance
16 of your proposal, or the LOI, between May 6 and
17 May 10, 2007?

18 A. I would have to check my records. As of
19 right now, I have nothing that would indicate
20 that, but I would have to go and check my records
21 again.

22 Q. Okay.

23 MR. VERSFELT: Do you have a set of the
24 documents you produced?

25 MR. VARGA: Yeah.

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Werner

MR. VERSFELT: Okay. Maybe we should take ten minutes and let you look through them.

MR. VARGA: Well, I don't know if ten minutes is sufficient.

MR. VERSFELT: Well, maybe we should take an hour and a half and let him look through them. I don't care.

MR. VARGA: Well -- wait a second.

Q. Let me ask it this way -- okay, you want to finish?

MR. VARGA: He wants to say something.

A. What I would need to do is go and check my e-mails, which I would have to go to my office to do.

Q. Why?

A. Because that's where my e-mails are.

Q. Didn't you produce your e-mails relevant to this case? Didn't you give them to your counsel and have him turn them over to us as the court ordered?

Don't we already have those e-mails, Mr. Werner?

A. I may have missed an e-mail that you're

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Werner

A. Yes.

Q. You saw the exhibits that your counsel put in front of him of strings of e-mails between May 6 and May 8, didn't you?

A. Yes.

Q. You knew perfectly well, then, that the period of May 6 to May 8 and the circumstances surrounding Lionel Flax's signing or not signing the LOI is a critical issue in this case, don't you?

MR. VARGA: Objection to form.

Q. Didn't you?

MR. VARGA: Excuse me. I would appreciate if you don't badger him, because that's just -- you know, you're pushing past a certain line that's acceptable. So you can ask one question, you'll let him answer. You don't push in that fashion, because I will have to call the judge on that. That is just improper.

So if you keep it one question at a time, give him an opportunity to respond, I have no problem with that. But when you -- when you -- when you have a shotgun style of

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Werner

asking for. You're asking me between the 8th and the 10th, so should I -- I'm not agreeing that you have all the e-mails. I'm not agreeing to that. I'm not disagreeing to that. I would have to check.

MR. VARGA: Counsel, what -- I understand what you're trying to do. In other words, have him commit that there was nothing between May 6 and May 10.

Now, I'm not -- I would certainly follow the same procedure. To the extent you want to give him opportunity to do that, it's fine with me. And then he can give you the response.

Q. Let's touch on production of documents.

Mr. Werner, you -- first, you attended the deposition of Mr. Lionel Flax yesterday, as the company representative, Kolo's, correct?

A. Yes.

Q. You were there the whole day, weren't you?

A. Yes.

Q. You heard all the questions that were asked of him, right?

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Werner

repeated questions, that's unacceptable.

Q. Mr. Werner, here is one question. You saw the e-mail strings that were used as exhibits by your counsel yesterday in the deposition of Lionel Flax. Correct?

A. No, I did not. I followed them to the best of my ability, when you guys were sharing documents. I can't say I followed everything that you were talking about.

Q. Well, they're all right there on the table. The Plaintiff's exhibits. Do you want to look through them now to see if there's any e-mail in there that would refresh your recollection as to whether you had a conversation with Lionel Flax on the substance of the LOI, or the proposal, during the period of May 6 to May 10, 2007?

A. I -- I would be happy to review them.

MR. VARGA: Sure.

Q. Let's look at this.

MR. VARGA: So, just for the record, let's go in order. Start with Plaintiff's 1, and then we'll continue with Defendant's exhibits. And then you will let us know the response to Mr. Versfelt's question.

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1 Werner
2 Q. Just put Plaintiff's Exhibit 1, and then
3 2, and then 3, up to 9, in front of the witness.
4 And then if he wishes to look at the Defendant's
5 exhibits, which he's already said this morning do
6 not refresh his recollection, that's fine with me,
7 too. I don't think it will take that long.
8 They're only nine exhibits.

9 MR. VARGA: Once you're done with the
10 document, let us know, and then I'll give you
11 the other one.

12 A. But you're asking whether or not
13 specifically if there was an e-mail exchange of
14 communication between the 8th and the 10th --

15 MR. VARGA: The 6th and the 10th.

16 A. Sorry, the 6th and the 10th, that
17 pertained to the substance of either the addendum,
18 proposal, LOI. And I'm saying, I'll be happy to
19 look at anything you have, but that doesn't
20 exclude that there may be another e-mail that I
21 may or may not have that would indicate, yes,
22 there was a conversation around substance.

23 I don't know exactly what you mean by
24 that, but I have a feeling that you're looking to
25 see if we discussed the details of any one of the

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1 Werner
2 record so that his answer is on the record.
3 So are you done with Plaintiff's 2?

4 THE WITNESS: Yes.

5 MR. VARGA: Okay. Plaintiff's 3, one
6 page, it's KP 0124.

7 So that you identify it for the record,
8 if there are any dates in the e-mails, you
9 should tell that, too, so that it gives it a
10 reference.

11 A. So Plaintiff's Exhibit 3 is referring to
12 e-mails in August -- on August 20. It's not that
13 area.

14 MR. VARGA: Plaintiff's Exhibit 4, for
15 the record, contains one page. It's KP 0125.

16 A. And then, here again, this is an e-mail
17 during August 17 --

18 MR. VARGA: Let the record reflect that
19 the witness pointed to the bottom half
20 portion of Plaintiff's Exhibit 4.

21 Go ahead.

22 A. And then, as you go up, this is an
23 e-mail, again, not involving myself. This is
24 August 17 between Kim and Lionel. Kim Hassler and
25 Lionel. And then the final top of the page --

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1 Werner
2 three references.

3 So, the answer is, I would be happy to
4 look through it. That doesn't mean that I would
5 agree that that's the only one. It's a chance
6 that I might have missed an e-mail.

7 MR. VARGA: All right. You have
8 Plaintiff's 2 in front of you.

9 THE WITNESS: Yeah.

10 This is after that. This is not in the
11 period that counsel is asking. This is
12 May 12. So he's asking between the 6th and
13 the 10th.

14 MR. VARGA: Well --

15 THE WITNESS: Is that right?

16 MR. VARGA: For the record, Plaintiff's
17 Exhibit 2 contains several pages, and take a
18 look through all of them just to make sure,
19 because he's asking you a broad question.

20 A. Okay, I've seen this one. That one we
21 just discussed, this e-mail string.

22 MR. VARGA: Page 2, Plaintiff's 2.

23 MR. VERSFELT: Robert, do you want to go
24 off the record?

25 MR. VARGA: No. Let's have it on the

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1 Werner
2 actually, I can't tell what that is because --

3 MS. HARRIS: KP 0124 and 125 go
4 together. We had discussed that yesterday.

5 MR. VARGA: So Plaintiff's 3 and 4 go
6 together. So we established yesterday
7 that --

8 A. So all of those, Plaintiff's Exhibit 3
9 and 4, are e-mails in August. It's not in the
10 question.

11 MR. VARGA: Okay. I'm putting in front
12 of you Plaintiff's Exhibit 5, which contains
13 three pages. It is marked KP 003, KP 004,
14 and KP 005.

15 A. Okay. These are -- this is an e-mail
16 string in March -- on March 30 and 29th. So
17 again, this is not relative to what the question
18 is.

19 MR. VARGA: Putting in front of you
20 Plaintiff's Exhibit 6, which contains two
21 pages, KP 006 and KP 007.

22 A. Okay. So these -- this is an e-mail
23 string, I guess you'd say, in March, on March 30
24 and April 2. So again, nothing's in that period.

25 MR. VARGA: So that was Plaintiff's 6.

25 (Pages 94 to 97)

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1 Werner
2 Plaintiff's 7, one page, it also contains
3 KP 0011, marking.
4 A. Okay. This is an e-mail on April 12,
5 and I think on March 8. Again, not relevant.
6 MR. VARGA: Plaintiff's Exhibit 8, one
7 page, also marked KP 0014.
8 A. Okay. So this is an e-mail starting on
9 April 20 and ending on April 20. Again, not
10 between the 6th and the 10th of May.
11 MR. VARGA: Plaintiff's Exhibit 9
12 contains three pages marked KP 0027, KP 0028,
13 and KP 0029.
14 A. This is an e-mail starting on Sunday the
15 6th.
16 Q. To be precise, May 6.
17 A. Sorry, May 6. Okay. And I've read this
18 one, and -- I'm aware of that.
19 MR. VARGA: Plaintiff's Exhibit 10,
20 one-page document.
21 A. Okay. This is not an e-mail and it
22 doesn't relate to counsel's question.
23 MR. VARGA: What is it?
24 THE WITNESS: It's a notice of
25 termination.

1 Werner
2 this is not -- clearly to me that does not look
3 like a part of the e-mail string, which is the
4 e-mail from Lionel Flax to Leonard and John
5 Golieb. That is not an e-mail string to me.
6 MR. VARGA: Okay.
7 Q. Yes, you testified about that earlier
8 this morning.
9 MR. VARGA: For the record, the witness
10 was pointing to the message text below what
11 appears to be like a file depiction on the
12 top of Defendant's Exhibit B, the first page,
13 KP 0031, and he specifically was pointing to
14 the language beginning at, "From: Master
15 file Flax," and there's an e-mail and the
16 date below and the subject, and there's a to
17 line as well.
18 Defendant's C, one-page document,
19 KP 0042. Please take a look.
20 A. Okay. And this was -- yeah, May 8, an
21 e-mail from me to Lionel. Yes.
22 MR. VARGA: Defendant's D, two-page
23 document, it's also marked KP 0044 and
24 KP 0045. Please take a look.
25 A. And this is the e-mail again on May 8,

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1 Werner
2 MR. VARGA: So these are plaintiff's
3 exhibits. And let's take a look at
4 defendant's exhibits.
5 All right. Let's go in order.
6 Defendant's Exhibit A marked KP 0030.
7 One-page document.
8 A. This is an e-mail on Sunday, May 6, from
9 me, and one from Lionel.
10 Let me just read this.
11 Yeah. That's the only reference of what
12 Lionel was asking for. He was -- intended to read
13 it. So yeah.
14 MR. VARGA: We're still on Defendant's
15 Exhibit A. Now we're moving on to
16 Defendant's B. So here, as marked today,
17 contains 11 pages, the Defendant's B. It's
18 marked KP 0031 through KP 0041.
19 Please take a look.
20 A. This is the same e-mail. Then there's
21 another e-mail on May 6.
22 MR. VARGA: To be precise, same e-mail
23 string, or a continuation of the e-mail
24 string.
25 A. It appears that way, yes, but this --

1 Werner
2 from myself to Lionel, where I was questioning if
3 he has signed the LOI, and then I -- he indicates
4 on Wednesday, May 9, that he just signed it -- I
5 just sent this through signed.
6 And then another e-mail above that on
7 May 10, where I said, "Thank you, Lionel, I will
8 look for it now." And then he says on May 10,
9 "Did you find it?" right after that.
10 MR. VARGA: Question mark.
11 A. Question mark.
12 MR. VARGA: Is there anything on page 2,
13 the second page, which is KP 0045 --
14 THE WITNESS: Nothing --
15 MR. VARGA: -- that would be relevant to
16 your answer?
17 THE WITNESS: Nothing. No, it wouldn't
18 be relevant.
19 Q. Okay. We've reviewed all of the
20 exhibits from yesterday at the Lionel Flax
21 deposition that you attended, and all of the
22 exhibits that we've used this morning so far.
23 A. Yes.
24 Q. And does that -- does that review of
25 those documents refresh your recollection as to

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1 Werner
2 whether or not you had any conversations with
3 Lionel Flax, during the period May 6 to May 10,
4 with regard to the substance of the LOI or the
5 proposal?
6 A. It does not refresh my memory.
7 Q. Okay. For the record, since you,
8 Mr. Werner, have raised the possibility that you
9 might have an e-mail at home or at your office,
10 that you have not yet produced in this action, I
11 want to direct to Mr. Varga, your attorney, the
12 demand that we receive every e-mail relevant to
13 this action, and that we receive it as soon as
14 possible.
15 I say as soon as possible, Robert,
16 because as you know, we're under time pressures,
17 and as you know, both parties were ordered by the
18 court to produce their e-mails prior to Saturday
19 at noon. Last Saturday.
20 MR. VARGA: Correct. The deadline was
21 last Saturday by noon, and just for the
22 record, I had received the fourth pack, the
23 last package from you, from actually
24 Elizabeth, Sunday afternoon, which was past
25 the deadline.

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1 Werner
2 MR. VERSFELT: Yes, indeed.
3 MR. VARGA: And I don't want to make an
4 issue about it.
5 MR. VERSFELT: No, I'm not going to make
6 an issue out of it either, but I'm just
7 telling you, I want the record clear that if
8 Mr. Werner had an e-mail that pertains to a
9 communication with anyone at Kate's, I should
10 have had it by Sunday afternoon, when you got
11 our last production, or earlier, and I
12 definitely want it now.
13 MR. VARGA: Just to clarify, you said
14 all. All.
15 MR. VERSFELT: All relating to these
16 shop-in-shop agreement, the proposal, the
17 LOI. You know perfectly well what I'm
18 talking about.
19 MR. VARGA: But for now, what he
20 testified to is that --
21 MR. VERSFELT: What he testified to is
22 on the record.
23 MR. VARGA: Exactly. But your question
24 defined the scope between 5/6 and 5/10, and
25 his testimony is basically, I am not a

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1 Werner
2 hundred percent sure. I want to confirm that
3 there's nothing else out there, and then I
4 respond.
5 MR. VERSFELT: No, he did respond.
6 MR. VARGA: Well, he did respond.
7 MR. VERSFELT: He said, based on
8 everything he's seen, and based on his
9 recollection as it now stands, he has no
10 recollection of a discussion of the substance
11 of the LOI or the proposal with Lionel Flax,
12 during the period May 6, 2007, to May 10,
13 2007.
14 Q. Correct?
15 A. Yes.
16 Q. Okay. Okay.
17 MR. VARGA: So --
18 Q. Let me --
19 MR. VARGA: Just for the record, my
20 client will conduct a search to determine if
21 there are any e-mails that were potentially
22 missed between -- in this deadline, between
23 5/6 and 5/10. Agreed?
24 MR. VERSFELT: Yes. And if there are
25 any such e-mails, you will produce them super

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1 Werner
2 pronto.
3 MR. VARGA: Agreed.
4 MR. VERSFELT: Okay.
5 MR. VARGA: Off the record.
6 MR. VERSFELT: Off the record.
7 (Discussion off the record.)
8 MR. VERSFELT: Let me ask the court
9 reporter to mark a single document as an
10 exhibit. It's Bates-stamped KP 0049, and it
11 will be Defendant's Exhibit E.
12 (E-mail from Mr. Werner to Lionel Flax
13 on May 12, 2007, Bates-numbered KP 0049, was
14 marked Defendant's Exhibit E for
15 identification, as of this date.)
16 (The witness read.)
17 MR. VARGA: Let us know when --
18 A. I am. Yes, I'm ready.
19 Q. Mr. Werner, can you tell us what this
20 exhibit is?
21 A. This is an e-mail from myself to Lionel
22 on Saturday, May 12.
23 Q. And what do you say in your first
24 sentence?
25 A. "I did receive your faxed LOI."

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Werner

1 Q. Okay. And what did you receive?

2 A. I received a faxed LOI.

3 Q. And what is that?

4 What was that?

5 A. What do you mean, what was it? It's a
6 piece of paper that was faxed with a signature on
7 it.

8 Q. Okay. What piece of paper?

9 A. It was a piece of paper -- it was either
10 one document with the signature, or it was the
11 entire LOI. I don't recall.

12 Q. The one document, if it was one
13 document, as you referred to, as distinct from the
14 entire LOI, what --

15 A. It wasn't distinct. I'm sorry, it was
16 not distinct. It was the signature page that I
17 remember distinctly. I don't remember seeing the
18 rest -- or the other two pages of the LOI, or the
19 other page.

20 Q. So do you remember that it was --

21 MR. VERSFELT: I'll deal with that.

22 MR. VARGA: Okay.

23 Q. Do you remember that it was the
24 signature page?
25

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Werner

1 A. Second page.

2 Q. So what you got was -- let me make sure
3 I understand. You don't recall whether there was a
4 cover page to the fax.

5 A. Yes. I do not recall.

6 Q. Okay. But whether or not there was a
7 cover page, what you recall getting is that --
8 what is page 2 of Plaintiff's Exhibit 1; is that
9 correct?
10

11 A. That's correct, yes.

12 Q. And you're certain that it had a
13 signature on it?

14 A. Absolutely.

15 Q. And that's what you got?

16 A. That's what I remember.

17 Q. The page that had a signature on it?

18 A. I believe that to be true.

19 Q. And you don't recall receiving the first
20 page of Plaintiff's Exhibit 1.

21 A. I don't recall. I'm sorry.

22 Q. And you don't recall receiving other
23 pages.

24 A. I don't recall. I just don't recall how
25 many pages were attached to the -- to the fax that

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Werner

1 A. Absolutely.

2 Q. And was it a -- did it have a cover
3 sheet, the fax?

4 A. I don't remember.

5 Q. Did it have any indication that it was
6 intended for you, that you recall?

7 A. I don't remember.

8 Q. Was it a single page that might have
9 said "To: Keith Werner" on it?

10 A. I don't remember. I really don't
11 recall.

12 Q. Okay. Was it the To page -- was it both
13 pages of the LOI, do you recall that?

14 A. I do not recall that.

15 Q. Okay. But you recall you got at least
16 one page.

17 A. I got -- I received a signature from
18 Lionel that day, yes.

19 Q. And what -- where -- what was the
20 signature on?

21 A. It was on a signature page. It was
22 Exhibit -- Plaintiff's Exhibit 1, that.

23 Q. The -- you're pointing to the second
24 page.
25

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Werner

1 I -- I'm referring to.

2 Q. Okay. But you do recall that you got
3 one page.

4 A. I received at least one page with a
5 signature, which is Exhibit-- Plaintiff's Exhibit
6 1, page 2.

7 Q. Okay. So you -- you're confident you
8 got that second page of Plaintiff's Exhibit 1, and
9 you're confident that it had a signature on it.

10 A. Yes.

11 Q. Where was the signature?

12 A. Right where it belonged, where the --
13 Kate's Paperie is.

14 MR. VARGA: For the record, pointing to
15 the bottom portion of -- the bottom signature
16 line on Plaintiff's 1, second page.

17 A. Correct.

18 Q. And what -- what signature was it, do
19 you recall?

20 A. I recall it to be Lionel's.

21 Q. Did you know what Lionel's signature
22 was?

23 A. Yes, I did.

24 Q. How did you know that?
25

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1 **Werner**
2 A. Because I believe he signed a
3 confidentiality agreement before that.
4 Q. Okay. So you're confident that Lionel's
5 signature was on it.
6 A. Yes.
7 Q. Had Lionel dated it?
8 A. I don't remember.
9 Q. Had Lionel signed -- see under the
10 signature line, where it says, "By its"?
11 A. Yes, he did sign that. He put -- yeah.
12 Q. He put what?
13 A. I believe he put "president," but I'm
14 not sure, but there was something there.
15 Q. Yes, okay. And what did your receipt of
16 that page indicate to you?
17 A. It indicated that he signed the letter
18 of intent.
19 Q. Okay. Now, what did you do with that
20 page?
21 A. I don't recall.
22 MR. VARGA: Just --
23 Q. Well --
24 MR. VARGA: You --
25 MR. VERSFELT: Is that an objection?

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1 **Werner**
2 MR. VARGA: Yes. Objection to form.
3 MR. VERSFELT: Okay.
4 Q. What did you do with the page that you
5 received?
6 A. I don't recall, and I would be
7 speculating if --
8 Q. Well, I don't know as I want you to
9 speculate.
10 MR. VARGA: No.
11 A. Okay.
12 Q. Did you put it in a file?
13 A. I don't recall.
14 Q. Did you put it on your desk?
15 A. I'm sure I put it on my desk.
16 Q. Did you sign the document yourself?
17 A. I did sign it.
18 Q. It wasn't signed when you sent it to
19 Lionel originally, right?
20 A. It was not.
21 Q. But once you got Lionel's signature, I
22 take it your testimony is you signed it?
23 A. Yes.
24 Q. And did you sign on the same page that
25 you had received back, via fax, from him?

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1 **Werner**
2 A. I -- I think I did, yes.
3 Q. So --
4 MR. VARGA: In other words, you're
5 asking the faxed copy? He signed the faxed
6 copy?
7 MR. VERSFELT: Yes. It's in English.
8 Q. So your testimony is you sign the same
9 page you received back, the page that would have
10 had his faxed signature on it.
11 A. I believe so. I'm not totally sure, but
12 I -- yes.
13 Q. Well, could there be any other page?
14 A. No, no other page.
15 Q. So that if you signed a page that had a
16 signature on it, it had to be his faxed signature,
17 didn't it?
18 A. I don't recall if I signed it in my
19 office, if that's what you're asking, and I
20 received it.
21 Q. No, it's not what I'm asking.
22 A. Okay.
23 Q. I'm asking whether you signed a page
24 that had his signature as a faxed signature.
25 A. I did sign it, yes. Whatever I signed

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1 **Werner**
2 had his signature on it, that I know.
3 Q. His faxed signature on it. We're
4 confirming that, aren't we?
5 A. Yes, we are.
6 Q. Okay. So you received back the page,
7 and it was signed by him in a faxed signature, and
8 you signed it.
9 A. I believe I did.
10 Q. Is it possible you didn't sign it?
11 A. It's not -- it's possible, but I
12 strongly believe that I signed it.
13 Q. Okay. Is it possible that you have lost
14 it because you didn't sign it?
15 A. No.
16 Q. Okay. So it's possible that you lost it
17 for some other reason, then.
18 A. No.
19 MR. VARGA: Objection.
20 Q. Where is it, Mr. Werner? This is a
21 contract that you say you signed. Where is it?
22 A. I don't know.
23 Q. Okay. Now I want you to speculate.
24 A. Okay.
25 Q. Where might you have put it?

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Werner

A. I think there was a chance that I brought it down to the Mercer Caf with me to give to Lionel, a copy of that, and for some reason, I can't locate it right now.

Q. Okay. You brought a copy of the signature page to Lionel --

A. No, I brought the whole LOI.

Q. Oh, the -- the -- the front page as well.

A. Yes.

Q. When you say the whole LOI, you mean the first two pages of Plaintiff's Exhibit 1.

A. I think that's what it was, yes.

Q. Okay. Fine. Now, you received from him a single faxed signature. Correct?

A. No, I'm not saying that.

MR. VARGA: No, he didn't say that.

Q. Well, wait, I'm confused. What I'm intending to ask is, when Lionel faxed it back to you, you got one page that was -- that had his signature on it; isn't that correct?

A. That's correct.

MR. VARGA: At a minimum, he testified.

A. At a minimum, right.

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Werner

Q. Okay. And then do you have any recollection whatsoever what happened to it after that?

A. I do not have any --

Q. And I take it you've racked your brain over this.

A. I would have produced it, yes.

Q. I assume you would have produced it as well. But what my question is really, that you've taken time to think about what you might have done with that document. Haven't you?

A. Yes, I have.

Q. In the months that have passed since May of 2007.

A. I wouldn't say months, but there's been some time I have been thinking about it, yes.

Q. Well, you thought about it prior to your attorneys filing this lawsuit, didn't you?

A. Yes.

Q. So you thought about it since then on more than one occasion.

A. Yes.

Q. You've thought about what you might have done with it.

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Werner

MR. VARGA: He recalls one page at a minimum. He doesn't know if --

MR. VERSFELT: Oh, oh, I see what you're saying. No, I understand. I'm not trying to quibble over that. I'm trying to say --

MR. VARGA: There was one signature at the time.

Q. He may have faxed you back one page or he may have faxed you the two pages, we don't know.

A. Right. Right.

Q. That's not the focus of my question.

The focus of my question is, the page you got that had a signature on it, his signature, his faxed signature, you then made a copy of.

A. I don't know that.

Q. Well, let me -- well --

A. I do not recall making it. I --

Q. Tell me what you recall you did with the page that had his faxed signature on it.

A. I remember taking it out of my mailbox, where I received my faxes, putting it on my desk and signing it in preparation for the meeting that we were having the next -- the next day or so.

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Werner

A. Yes.

Q. And you -- and your testimony is, you don't recall what you did with it.

A. I don't recall. There's a very strong possibility that I actually brought it to the meeting at the Mercer Caf, and handed in the file, indicating that that's what I -- he was asking me, and I told him I would do that. I cannot recall if he took the file or took the signed copy that I -- that I signed in that he signed. I do not recall it, but it's very -- it's a possibility that I brought it there.

Q. Okay. Let me try and refresh your recollection, then. This was a lunch at the Mercer Caf., correct?

A. Yes.

Q. That you're referring to after May 12, when you had received this signed copy. And who was present at the lunch, sir?

A. Two individuals besides Lionel: Mr. Akira Ito and Mr. Shin Ueno.

Q. Besides Lionel and you.

A. Correct.

Q. So there were four people total present.

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1 Werner
2 A. Yes.
3 Q. Do you recall that Lionel arrived late?
4 A. Yes, I do.
5 Q. Do you recall then that you and the two
6 Japanese gentlemen -- well, strike that.
7 How much time did you and the Japanese
8 gentlemen spend in the presence of Lionel at that
9 lunch?
10 A. I really don't know. An hour. For
11 lunch, maybe.
12 Q. What was the topic of discussion at the
13 lunch?
14 A. Oh, it was general conversation about
15 Ito-Ya, about the history of Kate's.
16 MR. VARGA: I'm sorry, what was that?
17 A. Ito-Ya is the retailer, I-T-O Y-A.
18 Q. Kolo has shop-in-shop arrangements with
19 Ito-Ya.
20 A. No, they do not.
21 Q. What is the arrangement that Kolo has
22 with Ito-Ya?
23 A. We sell our products to them.
24 Q. For mutual benefit, right?
25 A. Yes.

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1 Werner
2 Q. Okay.
3 Now, let me ask you this, Mr. Werner.
4 You have understood the significance of documents
5 since your days originating mortgages. You have
6 been a senior executive of Werner & Company, and
7 Kolo, for the better part of a decade, both.
8 Is it your testimony that you would
9 have -- you could have taken your only copy of the
10 LOI and given it away?
11 A. Is that my testimony? Is that the
12 question?
13 Q. Is that your testimony, yes.
14 A. It's possible that I could have given my
15 only copy out. It's possible. It's also possible
16 that I could have lost that.
17 Q. Where might you have lost it?
18 A. It could be -- I don't know. I really
19 don't know. I -- I truly do not know.
20 Q. But I take it you have searched your
21 office at Kolo.
22 A. Yes.
23 Q. And you've searched your -- whatever
24 area you used for your Werner & Company work,
25 right?

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1 Werner
2 A. Correct.
3 Q. And have you searched your home?
4 A. I have to some degree, yes.
5 Q. You've searched wherever you felt you
6 might find it.
7 A. Yes.
8 Q. Wherever you felt it possible that you
9 might find it.
10 A. Uh-huh. It could have accidentally been
11 thrown out as well. That's what -- I just cannot
12 figure out why we don't have it. It's very
13 unusual for us not to have it.
14 Q. It's very unusual for anyone not to have
15 a document that they consider a binding contract.
16 But you don't have it. Your testimony
17 is today, you just don't have it, correct?
18 A. That's correct.
19 (Luncheon recess at 12:46 p.m.)
20
21
22
23
24
25

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1 Werner
2 AFTERNOON SESSION
3 (1:49 p.m.)
4 KEITH WERNER
5 resumed, having been previously duly
6 sworn by a Notary Public, was
7 examined and testified further
8 as follows:
9 CONTINUED EXAMINATION BY MR. VERSFELT:
10 MR. VERSFELT: Back on the record.
11 Q. Mr. Werner, I've put before you the
12 document that was marked yesterday as Plaintiff's
13 Exhibit 1.
14 Now, do I understand your testimony
15 correctly that you do not recall whether or not
16 you prepared this from a preexisting template, or
17 whether your lawyer might have done so?
18 A. I do not recall it.
19 Q. So did I accurately reflect your
20 testimony?
21 A. I think you did.
22 Q. And is it also your -- accurate for me
23 to say your testimony is -- strike that.
24 Is it also your testimony that if you
25 prepared it, you had your lawyer review it, and if

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1 Werner
2 your lawyer prepared it, you reviewed it?
3 A. That's correct.
4 Q. And did you yourself make any changes to
5 the template, or draft, that you received?
6 A. I don't recall. That's -- I've no
7 recollection if I did that after he reviewed and
8 sent it back. I don't recall.
9 Q. Well, at any time, do you recall any
10 specific changes that you made to an earlier
11 document?
12 A. No.
13 Q. Okay. Well, let's look at the document.
14 I'll direct your attention to the first two pages
15 of Plaintiff's Exhibit 1, the LOI, or letter of
16 intent.
17 Now, looking at the first paragraph,
18 Mr. Werner, do you see in the second sentence --
19 the second line, where it says, "to enter into a
20 contract hereinafter called ('agreement')"?
21 A. Yes.
22 Q. To what does the word "agreement" in
23 that parentheses refer?
24 MR. VARGA: The top of the page.
25 MR. VERSFELT: Yes, I said.

1 Werner
2 signing of this. That's what that would mean to
3 me.
4 Q. So after the signing of this, there
5 would be an agreement drafted, and signed, to
6 encompass the -- to encompass the terms.
7 A. Rephrase?
8 Q. All right.
9 MR. VARGA: I'm not following.
10 Q. All right.
11 MR. VARGA: Ask him instead.
12 MR. VERSFELT: I'm going to ask him a
13 question.
14 Could I have the question before my last
15 question read back, please.
16 (The record was read back.)
17 Q. Good. What did the word "hereinafter"
18 mean to you when you read it in this document, in
19 or about May of 2007?
20 A. It meant that there would be an
21 agreement that would be provided to both parties
22 to review and sign.
23 Q. Okay. And what would that agreement
24 consist of?
25 A. I don't know.

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1 Werner
2 A. I would presume that it meant that there
3 is an agreement that both parties would end up
4 signing.
5 Q. And what agreement is that?
6 A. I don't know. You mean today, what is
7 it? Show you what it is?
8 Q. Well, if you can, what did you mean when
9 you -- what -- what in your mind was meant by the
10 word "agreement" in that second line, on or about
11 May of 2007?
12 A. It meant that the parties would sign an
13 agreement that reflects the terms and conditions
14 that they both agree to.
15 Q. That they would sign an agreement
16 that -- to be negotiated?
17 A. It doesn't say that, but I would presume
18 that that might be what that would refer to, yes.
19 Q. Okay. That the parties would negotiate
20 and sign an agreement.
21 A. Yes. But it doesn't state, at a later
22 date, so that's what's throwing me off.
23 Q. Well, what does the word "hereinafter"
24 mean?
25 A. Here and then thereafter, or after the

1 Werner
2 Q. Okay. Now I understand.
3 Well, can you look at the last sentence
4 of that same paragraph that I'm going to -- it's
5 the first paragraph. If I refer to it as the
6 umbrella paragraph, that's the paragraph I mean.
7 A. Yes.
8 MR. VARGA: Plaintiff's 1.
9 Q. Have you ever heard the phrase "umbrella
10 paragraph"?
11 A. No.
12 Q. We'll try to call it the first
13 paragraph. You see the sentence that starts, "It
14 is intended that the parties will enter into a
15 more formal agreement"?
16 A. Yes.
17 Q. Okay. Is the more formal agreement
18 that's referred to in that sentence intended to be
19 the agreement that is in the parenthetical in the
20 sentence before?
21 A. I -- I don't know. It may be. It's
22 possible. I -- I'm not sure if I could say yes or
23 no, but it's very possible.
24 Q. Okay. So let me ask, with specific --
25 strike that.

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Werner

1
2 Let me ask particularly with regard to
3 the time frame of May of 2007. In or about early
4 May of 2007, was it your understanding that the
5 agreement that is referred to in the first
6 sentence, with a capital A, is referring to a
7 later, more formal agreement, as referred to in
8 the second sentence of that first paragraph?

9 A. So your question, to clarify, is, does
10 this word, in quotations --

11 Q. Agreement.

12 A. -- "agreement," mean the same thing as
13 formal agreement?

14 Q. What was your understanding in May of
15 2007, is what I'm asking. Was it your
16 understanding that the word "agreement" there in
17 the first sentence was referring to a more formal
18 agreement in the second sentence?

19 A. I don't recall. I don't know.

20 Q. Okay. Now, let me ask this way: Could
21 you look at the paragraph numbered 1. Could you
22 look at the last sentence of that paragraph
23 numbered 1. Maybe, so we're clear, you could read
24 it into the record.

25 A. "Together with and at the same time as

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Werner

1
2 this, there's language in here that I don't
3 remember putting in, so I don't know.

4 Q. Okay.

5 A. Okay?

6 Q. It may have been put in by your lawyer?

7 A. Could be, yes.

8 Q. Was there anyone else at Kolo that
9 worked on the document?

10 A. No. No. It could have been discussed
11 with our lawyer.

12 Q. Okay. And I'm not asking about the
13 substance of those discussions. But we have
14 already established, haven't we, that the document
15 that's before you was prepared by Kolo, either
16 Kolo or Kolo's lawyer.

17 A. Yes.

18 Q. In collaboration of some sort that you
19 don't recall the details on. So somebody at Kolo
20 put in the words "rental agreement," correct?

21 A. Or our attorney.

22 Q. I'm sorry, you are right, or your
23 attorney. And you do not recall what you intended
24 those words to mean at the time you sent this
25 thing to Lionel Flax, right?

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Werner

1
2 this agreement is entered into, the parties will
3 also conclude a rental agreement and Kate's will
4 provide Kolo a consent from the current landlords
5 for such rights to sublease."

6 Q. Okay. Now, my question to you is, is --
7 strike that.

8 In May of 2007, did you understand that
9 there would be a rental agreement entered into
10 between Kate's and Kolo?

11 A. No.

12 Q. Okay. Then can you tell me what is
13 referred to by the words "rental agreement" in
14 that last sentence of paragraph 1?

15 A. Yeah. So it says, "together with," and
16 at the same time as this agreement is entered, the
17 parties will also conclude a rental agreement. So
18 if I understand your question, did I expect to
19 have a rental agreement?

20 Q. Well, my question was -- let me try to
21 restate it.

22 In or about May of 2007, what did you
23 intend the term there, "rental agreement," to
24 mean?

25 A. I don't remember. In fact, as I read

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Werner

1
2 A. I do not recall.

3 Q. Okay. Let me ask you this: Does the
4 capital word -- the capitalized A agreement, in
5 the third-to-last line of paragraph 1 of this
6 document, does that word "agreement" mean the same
7 as the word "agreement" in the second line of the
8 first paragraph?

9 A. I don't know. It's possible. I just
10 don't know.

11 Q. Okay.

12 A. I would think that this would be in the
13 same way done in the -- in the document, but I
14 don't know.

15 Q. Okay.

16 A. It's ambiguous, to be honest with you.
17 I don't -- I don't know what that means.

18 Q. Okay. Let me ask the same question with
19 regard to the word "agreement" that is capitalized
20 in paragraph 7 of the document. It's on the
21 second page.

22 My question to you -- do you see that
23 paragraph 7?

24 A. Yes.

25 Q. The word "agreement" appears there about

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Werner

four lines down in the center of the paragraph.

A. Uh-huh.

Q. Your lawyer is pointing to it.

MR. VARGA: Right.

Q. So my question to you, Mr. Werner, is the same. Does -- was it your understanding in May of 2007 that that word "agreement" with a capital A was intended to mean --

A. No.

Sorry.

Q. -- was intended to mean the same as the word "agreement" in the second line of the first paragraph of the document?

A. When I read that, I would describe that to mean this document. But that's what my -- that's -- reading it in this paragraph --

Q. In the paragraph 7.

A. Yes -- would mean that it's this document, to me.

Q. Okay. So paragraph 7, it's your testimony -- well, it's your testimony that, reading it today, you think that. Or is it your testimony that back in May of 2007 --

A. Reading it today.

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Werner

written here. Today, when I read it, it doesn't -- I can't recall why there is a difference.

Q. Okay. Now, let me ask about the last word of the document on page 2. You see just above the Kolo Retail, LLC, signature line --

A. Yes.

Q. -- it has "Agreement" with a capital A.

A. Yes.

Q. Is that intended to be the same document as the agreement that you -- that is referred to with a capital A in paragraph 7, on that same page?

A. When I read this right now, it -- I think it refers to this document --

Q. But you're not sure.

A. -- that also relates to what is being said in paragraph 7. To me, when I read both of those, it clearly indicates to me that it's this document, not a future document, as opposed to in the first paragraph.

But you know, again, there's -- I can't remember what the -- what the distinction is and why it was there.

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Werner

Q. Let me ask the same question with respect to back in May of 2007.

In May of 2007, did you intend the word "agreement" in that paragraph 7 to be the same as the word "agreement" in the first sentence of the document?

A. I can't -- it says what the intent -- what my understanding was at the time in May. It seems to me that this sentence refers to this document.

Q. Okay. Why can't you state your --

MR. VARGA: You said this. You were pointing to paragraph 7?

THE WITNESS: Yes.

MR. VERSFELT: Yes, he was pointing to -- there's no contention there. He was pointing to paragraph 7.

Q. Why can't you testify as to your understanding of the document in May of 2007?

A. Well, one, I don't remember discussing that with our attorney.

And two, I don't -- I don't understand why there's a difference between the quotation, agreement, and this agreement, as -- as it's

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Werner

Q. Okay. Now, the agreement just above the signature line on page 2 is at the end of a sentence. Can you read that sentence?

A. The end of the signature -- "By signing below, each party agrees and consents to the above-mentioned terms and agrees to act in good faith to complete the negotiations for additional terms which will be set forth in the agreement."

Q. Okay. Which -- it says "which will be set forth in the agreement," doesn't it?

A. Yes, it does.

Q. And your testimony is that that agreement referred to there is the same as the agreement listed in paragraph 7. Did I get that correctly?

A. It appears that it's referring to this document in both 7 and this paragraph before the signature line.

That's how it's written. But that's -- I don't know what the intent was, but that's how -- that's how I interpret it now.

Q. That's how you read it today?

A. Yes.

Q. And you don't recall what interpretation

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1 **Werner**
2 you may have put on those terms in May of 2007.
3 Is that correct?
4 A. Rephrase. I don't know what your
5 question is.
6 Q. Okay. My question is that your
7 testimony, in looking at the document today, is
8 based on your reading of the document today,
9 rather -- is that correct?
10 A. If your question is, what is the
11 distinction between --
12 MR. VARGA: That's not the question.
13 A. I'm sorry.
14 Q. Let me just try to rephrase it clearly.
15 My question to you, Mr. Werner, is, in
16 looking at the document today and giving your
17 interpretation of it, you're basing your
18 interpretation of the document today on your
19 reading of the document today.
20 A. That's correct.
21 Q. And I think -- is your testimony that
22 you have no recollection of what you intended the
23 terms to mean in May of 2007?
24 A. No, that's not true.
25 Q. Okay. Well, tell me what you

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1 **Werner**
2 cover additional terms, that we would agree in
3 good faith to enter into a more formal agreement
4 that had additional terms. That's what I remember
5 now.
6 Q. Okay. Okay.
7 MR. VARGA: Off the record.
8 (Discussion off the record.)
9 Q. So what's your recollection -- is it
10 fair to say that what you anticipated was that the
11 parties would negotiate additional terms through
12 negotiation?
13 MR. VARGA: Objection.
14 A. No.
15 Q. Well, tell me what your recollection is,
16 Mr. Werner, please.
17 A. My recollection is that we were willing
18 to address additional terms that they had, or that
19 we might have, to enter into another agreement,
20 that those terms were not in this document. This
21 allowed us to move forward in -- moving our
22 property into that space.
23 Q. What space?
24 A. Into the -- sorry. Into the 72 Spring
25 Street, Soho store space.

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1 **Werner**
2 intended --
3 A. Okay.
4 Q. -- the....
5 A. Starting --
6 Q. In 2007.
7 A. Starting with which part? "By signing
8 below, each party agrees?"
9 Q. Yeah.
10 A. "By signing below, each party agrees and
11 consents to the above...."
12 (Discussion off the record.)
13 (The witness read.)
14 A. My recollection when reading this is
15 that there were -- there was a -- additional
16 agreement that would set forth additional terms
17 that this agreement did not necessarily cover.
18 That's what the intent was, as I read it now, and
19 I recall that. So there were additional terms
20 that were not stated in this document that the
21 parties were going to enter into.
22 Q. And what were those additional terms?
23 A. There were just these terms, nothing
24 specific. It was never discussed at any time what
25 the specific terms were. It was that if we didn't

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1 **Werner**
2 Q. Okay. And if there were other terms
3 that the parties considered significant, either
4 party could raise it, and those terms could be
5 negotiated and put into a subsequent agreement.
6 A. Yes. That's true.
7 Q. Okay.
8 Was any such subsequent agreement ever
9 negotiated?
10 A. No. It was my recollection that I was
11 waiting for Kate's to produce any type of document
12 that they felt should -- well, for us to review, I
13 guess, with additional terms.
14 Q. And how long did you wait?
15 A. Well, I'm still waiting.
16 Q. Okay.
17 A. I don't mean to be, you know, wise guy,
18 but I'm just saying, I'm still waiting.
19 Q. I didn't take it as a wise guy answer.
20 There -- the -- so the bottom line is, there
21 was -- there has been no subsequent negotiation of
22 additional terms in the year and a half since this
23 LOI was circulating around in May of 2007,
24 correct?
25 A. That's absolutely correct. There's no

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1 Werner
2 need for it.
3 MR. VARGA: Off the record.
4 (Discussion off the record.)
5 MR. VERSFELT: I think I misspoke just
6 now and said a year and a half, when I really
7 should have said eight months.
8 Q. But your answer would be the same, eight
9 months or a year and a half.
10 MR. VARGA: Basically, nothing since --
11 since the -- this was executed, there was no
12 additional terms discussed.
13 A. There was no additional terms that were
14 discussed.
15 Q. Okay. Now, let's look at paragraph 1,
16 again, of this letter of intent.
17 Paragraph 1 refers to an Addendum A.
18 Correct?
19 A. That's correct.
20 Q. And what does this paragraph say that
21 that attached Addendum A does?
22 A. Well, I can read the -- the sentence,
23 "The attachment Addendum A defines the agreed-upon
24 space at the Spring Street store."
25 Q. Right. What's the next sentence say?

1 Werner
2 Addendum A any layout or drawing for any space,
3 other than the space in the Soho store, the store
4 at Spring Street?
5 A. Not other than the Soho store.
6 Q. Okay.
7 A. Can we take a quick break, real quickly?
8 Just use the restroom?
9 Q. Sure.
10 (A recess was taken.)
11 Q. So to confirm, Mr. Werner, there's no --
12 there is no specific location identified by layout
13 or drawing for the Third Avenue Kate's Paperie
14 shop in Plaintiff's Exhibit 1. Correct?
15 A. That's correct.
16 Q. And there is no specific location shown
17 by layout or drawing for the 57th Street Kate's
18 Paperie shop in Exhibit Plaintiff's 1.
19 A. That's correct.
20 Q. The only location that is set forth and
21 identified in Plaintiff's Exhibit 1 is the layout
22 for the Spring Street store.
23 MR. VARGA: Objection to form.
24 Q. Okay. I'll try it.
25 MR. VARGA: Just to clarify, as long as

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1 Werner
2 A. "Layout and drawings showing such
3 dedicated spaces attached hereto in Addendum A."
4 Q. Okay. So do those two sentences define
5 the space at the Spring Street store that Kolo
6 proposed to take in the shop-in-shop agreement?
7 A. The Addendum A refers to the space at
8 the Spring Street store, yes.
9 Q. And just for completeness, I think we've
10 many times established that the third page through
11 the end of this exhibit is the addendum. Is that
12 correct?
13 A. Yes, it is.
14 Q. And so what pages -- could you show me
15 what pages in the addendum show the layout and
16 drawings for the dedicated space in the Spring
17 Street store?
18 A. It would be 4, 5 and 6.
19 Q. Yes, okay.
20 Now, is there any similar layout or
21 drawing with regard to space in any other Kate's
22 Paperie location in Plaintiff's Exhibit 1?
23 A. Not in Plaintiff's Exhibit 1, no.
24 Q. And same question, except using the
25 term, Addendum A. So is -- was there in

1 Werner
2 you limit it to layout, that the only layout
3 in this document -- because you said
4 information, and that's a -- somewhat
5 confusing, because --
6 MR. VERSFELT: Fair enough. If I said
7 information, I misspoke.
8 Q. The only layout of space set forth in
9 Plaintiff's Exhibit 1 is the diagram and layout
10 pages for the Spring Street store. Correct?
11 A. Yes. The only layout, yes.
12 MR. VARGA: Is that nearby?
13 THE WITNESS: Huh-huh.
14 Q. Okay, let's look at paragraph 3.
15 Paragraph 3. And it's entitled
16 Commencement.
17 Could you read the first two sentences
18 of that paragraph.
19 A. "The commencement of the first Kolo
20 Retail store within Kate's store concept will
21 begin on or around June 1, 2007, located on Spring
22 Street. The other locations, Third Avenue and
23 57th Street, will commence approximately one month
24 thereafter."
25 Q. So this LOI sets forth a specific date

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1 **Werner**
 2 **for commencement of the Kolo Retail store in the**
 3 **Spring Street location, correct?**
 4 A. It says that it will commence
 5 approximately one month. Not specifically.
 6 Approximately.
 7 **Q. Approximately June 1.**
 8 A. No. It says, "will commence
 9 approximately one month thereafter." For the
 10 other two stores.
 11 **MR. VARGA: No --**
 12 **Q. My question is for the Spring Street**
 13 **store, does it give a date?**
 14 A. Yes, it does.
 15 **Q. And it -- the day is defined as on or**
 16 **around June 1, 2007.**
 17 A. That's correct.
 18 **Q. For the other locations, it does not**
 19 **give a specific date, correct?**
 20 A. It does not give a specific date.
 21 **Q. Okay. It says, "approximately one month**
 22 **thereafter." Correct?**
 23 A. Yes.
 24 **Q. Could you look at paragraph 5 of the**
 25 **LOI, please.**

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1 **Werner**
 2 **What was the -- strike that.**
 3 **What did you intend to convey by**
 4 **paragraph 5?**
 5 A. We were working toward a solution that
 6 helped Kate's use their current inventory as a
 7 starting inventory for any shop-in-shop, so that
 8 both companies didn't have to purchase more or too
 9 much inventory, and that we would accommodate
 10 Kate's by using their inventory and offering them
 11 a credit to some -- you know, a credit for that
 12 product that they directly bought from Kolo.
 13 **Q. Is that what is meant here by the -- the**
 14 **phrase, "Kolo will agree to accept responsibility**
 15 **of the current inventory"?**
 16 A. Yes, it is.
 17 **Q. That you would provide Kate's with a**
 18 **credit for the inventory that they currently held**
 19 **of Kolo goods.**
 20 A. It was implied.
 21 **Q. Implied?**
 22 A. It -- that's -- when you say credit, we
 23 didn't specifically say credit, but that's
 24 basically what I would -- I would agree to.
 25 And I would have agreed to.

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1 **Werner**
 2 **Q. And is that a term that you could have**
 3 **worked out with Kate's, subsequently?**
 4 A. Easily enough. That's an acceptable
 5 practice. It's called a return, so that would
 6 have been a return back to Kolo, and we would have
 7 just basically given them a credit for what they
 8 purchased in the past.
 9 **Q. I see. So paragraph 5 does not -- if I**
 10 **understand you correctly, paragraph 5 does not**
 11 **itself provide them with a credit.**
 12 A. No.
 13 **Q. It -- but I take it your testimony is**
 14 **that it makes clear that the handling of their**
 15 **inventory is a term that can be negotiated between**
 16 **the parties. Is that correct?**
 17 A. I don't know what your question is on
 18 that point.
 19 **Q. Okay. Well, I'm just trying to make**
 20 **sure I understand what you've testified about. I**
 21 **think we're both clear that the word "credit" does**
 22 **not appear in paragraph 5.**
 23 A. Yes.
 24 **Q. Okay. And is -- is it your testimony**
 25 **that what was intended by paragraph 5 was that**

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1 **Werner**
 2 **Kolo and Kate's would work out in an inventory**
 3 **arrangement that would benefit both parties by not**
 4 **requiring excessive purchases?**
 5 A. Yes. And let me clarify --
 6 **MR. VARGA: Objection to form.**
 7 **Go ahead.**
 8 A. And let me clarify. In the last
 9 sentence, it does say, "Kolo will issue a credit
 10 memo to Kate's for receiving such qualified
 11 inventory." So it was intended to provide them
 12 with a credit memo, should we have received a -- a
 13 return of that inventory.
 14 **MR. VARGA: So to the extent your prior**
 15 **statement that there were -- the word**
 16 **"credit" does not appear is incorrect. It is**
 17 **in paragraph 5.**
 18 **Q. Well, let me clarify. Let me clarify my**
 19 **question. The word "credit" does not appear with**
 20 **respect to Spring Street location in that**
 21 **paragraph; isn't that right?**
 22 **MR. VARGA: Objection to form.**
 23 **Q. Well, if the word "credit" appears in**
 24 **that paragraph, in connection with the Spring**
 25 **Street location, please tell me where it is.**

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Werner

A. It says, "Upon commencement of each location, starting with Spring Street location" --

Q. Right.

A. -- "Kolo will agree to accept responsibility of the current inventory that Kate's provides to Kolo for that location."

So in that case, it did include Spring Street.

Q. Yes. Agreed. That sentence includes Spring Street.

A. "All inventory must be in salable condition when provided by Kate's at the time of commencement for each additional store. Kolo will issue a credit memo to Kate's for receiving such qualified inventory," for each additional store.

Q. Right. So the credit memo is going to apply to subsequent stores.

A. Well, I would -- I would say it included Spring Street. Why would we not do it -- I'm sorry.

Q. It doesn't say that explicitly, does it?

A. I think it does, but that -- I -- I think personally it does.

Q. Okay. Can you --

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Werner

A. Yeah. I just want to see what -- okay.

Yes, it does refer to Soho, 72 Spring Street location.

Q. Yes. And just to be clear, there is no profit and loss projection or compensation schedule in Addendum A for the Third Avenue store. Correct?

A. No. My intent, in providing Kate's this schedule --

Q. Which schedule?

A. The Addendum A -- Addendum A. And what we're saying is Plaintiff's Exhibit 1.

MR. VARGA: Starting at page 3.

A. So from 7 through the end --

MR. VARGA: Just say what the title is.

A. Soho Proposal Basic Terms. And all the other pages to the end was used for the purpose of the -- to define the terms for those future stores as well.

Q. Okay. Let's look at the page that's entitled Soho Proposal Basic Terms.

A. Okay.

Q. Have you got that?

A. Yes.

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Werner

A. It -- starting with Spring Street location. It --

Q. Yes. "Starting with Spring Street location, Kolo will agree to accept responsibility of the current inventory." So I take it your testimony is that that means that Kolo will issue a credit memo for the Spring Street store inventory.

A. Should we have received it. Yes. Should we have received any inventory. At the time, there was no inventory. They agreed that they had no inventory to provide Kolo as a return to be used for Spring Street. So therefore, there was nothing to provide them with the credit memo in. That was very clear.

Q. Okay. Then looking -- let's move down to paragraph 7.

A. Yes.

Q. Now, I -- is it the case that Addendum A contains profit-and-loss projections and a compensation schedule for the Spring Street location?

MR. VARGA: He's referring to Addendum

A.

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Werner

Q. It's the page prior to the one you're looking at.

Soho Proposal Basic Terms.

A. Uh-huh.

Q. Now, does Soho refer to the Third Street store?

A. It does.

Q. It does?

A. No, I'm sorry. No, it doesn't.

Q. Soho does not refer to the Third Street store, does it?

A. No.

Q. Does Soho refer to the 57th Street store?

A. No.

Q. Soho refers to the Spring Street store, correct?

A. Yes.

Q. This is entitled Soho Proposal.

A. But in this proposal, was also the financial model for future stores.

Q. I'm looking at the page that says "Soho Proposal Basic Terms." Can you point to any reference on that page to the Third Street Store

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1 **Werner**
 2 or the 57th Street store?
 3 **Third Avenue store or the 57th Street**
 4 **store.**
 5 **(The witness read.)**
 6 A. There's no reference to Third or 57th
 7 Street stores on this page.
 8 Q. Right. Just so we're clear, because --
 9 I was pointing and your lawyer was pointing,
 10 there's no reference to any location other than
 11 Soho on this page that's entitled Soho Proposal
 12 Basic Terms. That's correct, right?
 13 A. That's correct.
 14 Q. Okay. Now, let's turn to the next page.
 15 What's the title of that page, sir?
 16 A. Financial Proposal.
 17 Q. Okay. Can you point to any reference to
 18 the Third Avenue location or the 57th Street
 19 location on that page?
 20 A. No.
 21 Q. Okay. So the answer is the same as with
 22 the prior page, there's no reference to either of
 23 those other stores on that page.
 24 A. Correct.
 25 Q. That page is intended to address the

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1 **Werner**
 2 Q. Correct. Now, does that refresh your
 3 recollection that the financial proposal page that
 4 we were looking on -- excuse me, that we were
 5 looking at, is a compensation schedule for the
 6 Spring Street location?
 7 A. It would appear so.
 8 Q. Thank you.
 9 There is -- I apologize if I've already
 10 asked you this question, but just so we're clear,
 11 that financial proposal page that is in Addendum A
 12 does not refer to the Third Avenue location or the
 13 57th Street avenue location.
 14 A. It does not.
 15 Q. Okay.
 16 And now that you've reviewed
 17 paragraph 7, do you agree that paragraph 7
 18 explicitly defines Addendum A as containing
 19 compensation schedule and a profit and loss
 20 protection -- strike that.
 21 MR. VARGA: I was about to ask where did
 22 you read that. So we're on the same page.
 23 Q. Let me ask it this way. And we now all
 24 agree that the compensation schedule contained in
 25 Addendum A was addressed to the Spring Street

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1 **Werner**
 2 Soho location. Correct?
 3 A. Not necessarily.
 4 Q. Well, what does it say?
 5 A. It doesn't say anything about Soho here,
 6 actually.
 7 Q. But it doesn't say anything about the
 8 other stores.
 9 A. But that doesn't imply that it meant
 10 only the Soho store.
 11 Q. Well, let's look back at paragraph 7 of
 12 the letter of intent.
 13 Could you read me the third sentence of
 14 paragraph 7.
 15 A. Starting with, "The compensation
 16 schedule"?
 17 Q. Please, read that sentence and the next
 18 sentence, please.
 19 A. "The compensation schedule for Spring
 20 Street is also attached hereto in Addendum A.
 21 Kolo shall compensate Kate's according to the
 22 compensation schedule set forth in Addendum A for
 23 the Spring Street location, and according to
 24 future addendums for the other locations as they
 25 are agreed upon."

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1 **Werner**
 2 store only.
 3 A. It appears that way, yes.
 4 Q. Thank you.
 5 And you intended that to be that way in
 6 May of 2007, correct?
 7 A. No.
 8 Q. No?
 9 A. I can't say that.
 10 Q. You can't.
 11 A. No, I don't recall that.
 12 Q. Okay. Well, do you recall that at the
 13 time you sent this LOI and Addendum A to Lionel
 14 Flax, that you disagreed with the statement in
 15 paragraph 7 that the compensation schedule for
 16 Spring Street is attached hereto as Addendum A?
 17 A. I do not recall disagreeing to it.
 18 Q. Okay. Do you have any recollection at
 19 all of your thinking at the time you sent the
 20 compensation schedule to Lionel Flax in May of
 21 2007 that the compensation schedule did not accord
 22 with the language of paragraph 7?
 23 A. I -- I don't understand the question.
 24 Q. What don't you understand about it?
 25 A. Can you rephrase that question?

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Werner

1 Q. Can you help me with what you don't
2 understand?

3 A. When you said in accord with, tell me
4 again, or --

5 Q. Okay, that's fair. I'll try and use
6 different words.

7 Do you have any recollection in or about
8 May of 2007 that, as you read the draft LOI that
9 you sent to Lionel Flax, that its reference to a
10 compensation schedule for Spring Street was not
11 what was set forth in the financial proposal page
12 of Addendum A?

13 MR. VARGA: Objection to form.

14 A. I recall the compensation schedule in
15 Addendum A to apply to Soho and used as a -- as a
16 basis for future stores.

17 Q. For future negotiations with regard to
18 future stores.

19 A. Future --

20 Q. Is that correct?

21 A. Future stores, yes.

22 Q. To negotiations that would be directed
23 to additional stores.

24 A. Yes. But I wouldn't say negotiations.
25

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Werner

1 Q. Okay. Were future addendums for the
2 other locations ever agreed to?

3 A. No.

4 Q. Okay. Did you anticipate in May of 2007
5 that if future agreement to addendums for other
6 locations could be reached, that those addendums
7 would be attached to an agreement?

8 A. Attached to this agreement.

9 Q. Okay.

10 MR. VARGA: Plaintiff's 1.

11 A. Plaintiff's 1. Yes.

12 Q. So that -- so is it -- was it your
13 understanding in May of 2007 that Addendum A was
14 addressed to the Spring Street store, and Kate's
15 and Kolo might agree to additional addendums that
16 could also be attached?

17 A. That's my recollection, yes.

18 Q. Maybe be called Addendum B and
19 Addendum C and addendum up to Z, but Addendum A
20 was directed to the Spring Street or Soho store.

21 A. No, I'm not saying that, but -- I will
22 say that it was likely that we would use a new
23 addendum should the terms change from this
24 addendum. That I will agree to.
25

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Werner

1 Maybe we're talking semantics, but it was a basis
2 of what we would use to go forward, because the
3 percentage of rent was a factor of what they were
4 paying, and we were using that as a basis to talk
5 about those other stores.

6 Q. Okay.

7 A. Okay?

8 MR. VARGA: Model?

9 A. Model. Yeah, as -- basis, a model. It
10 was exactly that, a model.

11 Q. A model.

12 A. Yeah.

13 Q. To be addressed in connection with the
14 other stores.

15 A. Yes.

16 Q. But the financial proposal page in
17 Addendum A is described in paragraph 7 as the
18 compensation schedule for Spring Street. Correct?

19 A. Yes.

20 Q. Okay.

21 And is it the case that in May of 2007,
22 you anticipated that Kate's and Kolo might agree
23 to future addendums for the other locations.

24 A. Yes.
25

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Werner

1 Q. Okay.

2 A. Okay?

3 Q. And that would -- whether or not the
4 terms would change, would depend on negotiations
5 between Kate's and Kolo.

6 A. It's not so much the negotiations. It
7 was really -- I guess we're saying the same thing,
8 but it was really once we narrowed down the two
9 locations inside those stores, it may change this
10 addendum, yes.

11 Q. Okay. Now, let's look at term.
12 Paragraph 8 on page 2 of this agreement.

13 This exhibit.

14 A. Uh-huh.

15 Q. Could you -- well, review paragraph 8,
16 term, please. I'm going to ask you some questions
17 about it.

18 (The witness read.)

19 A. Okay.

20 Q. According to the words of paragraph 8,
21 if Kolo -- how long could Kolo keep the space at
22 the Soho store, the Spring Street store?

23 A. For three years.

24 Q. Where does it say three years?
25

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1 Werner
2 A. Sorry. In paragraph 8 it does not say
3 three years.
4 **Q. What does it say in paragraph 8?**
5 A. It says, "The term of each sublease will
6 be for one year from the commencement date. Kolo
7 shall retain the right to renew each sublease for
8 an additional one year, and each year thereafter
9 as it becomes due, by giving 60 days' notice to
10 Kate's prior to termination."
11 So it does indicate that we have the
12 ability to renew for more than one year.
13 **Q. For how many years? More than one year?**
14 A. For two years. One -- two more years.
15 **Q. Where does it say that?**
16 A. Retain the right to renew each sublease
17 for an additional one-year period, and each year
18 thereafter. So the first, the second, and each
19 year thereafter.
20 **Q. Oh, so your reading of the words of**
21 **paragraph 8 is that Kolo could not stay in that**
22 **space beyond three years, even if it wanted to.**
23 **Is that correct?**
24 A. No, I'm not saying that. Kolo shall
25 retain the right to renew each sublease for an

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1 Werner
2 additional one year, and each year thereafter as
3 it becomes due, by giving 60-day notice. It
4 doesn't have a total completion date, a maximum
5 time limit. It just says, in each year
6 thereafter.
7 **Q. Yeah. Sometimes it's called an**
8 **evergreen clause.**
9 A. Yeah.
10 **Q. You understand that term?**
11 A. No.
12 **Q. Okay. But there is no end date in**
13 **paragraph 8, is there?**
14 A. There's no specific date, no.
15 **Q. Yeah. So that if Kolo wanted to stay in**
16 **the space in the Spring Street store for ten**
17 **years, and if each year 60 -- it gave at least**
18 **60-day notice in timely fashion, it could stay,**
19 **according to the terms of paragraph 8. Is that**
20 **correct?**
21 A. And according to the other terms of
22 the -- of this agreement, yes.
23 **Q. Well, what other terms of the agreement?**
24 A. Well, there's other terms here.
25 Well, it also refers to the addendum, so

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1 Werner
2 you have to bring the addendum into this.
3 **Q. Right.**
4 And how would you -- how did you
5 anticipate that that should be done in May of
6 2007?
7 A. Well, according to the addendum entitled
8 Soho Proposal, it says, in number 2, Lease
9 Options, "Kolo has the right to three one-year
10 options."
11 It also goes to say that we -- in -- in
12 paragraph 3, "Right to terminate," and states that
13 Kolo -- if Kolo continues to pay Kate's, a
14 minimum -- okay, I'll start from the beginning.
15 Paragraph 3, "Right to terminate."
16 Kate's has the right to terminate the agreement
17 after the first year, and each year thereafter,
18 unless Kolo continues to pay Kate a minimum of
19 \$140 per square foot plus a 6 percent royalty."
20 So those are the terms I'm referring to,
21 in addition to paragraph 8.
22 **Q. Right. Those paragraphs 2 and 3 there,**
23 **on the page that's entitled Soho Proposal Basic**
24 **Terms, are intended to be a part of the LOI,**
25 **aren't they?**

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1 Werner
2 A. They are.
3 **Q. Now -- and it's your understanding that**
4 **if they are more restricted than the terms in --**
5 **than the words -- strike that.**
6 Let me start over.
7 And is it your understanding that if the
8 basic terms of the Soho Proposal are more
9 restrictive than the words in the first two pages
10 of this exhibit, the LOI, that the more
11 restrictive provision would control?
12 A. No.
13 **Q. Okay. Tell me what was your**
14 **understanding of --**
15 A. I didn't have an understanding until you
16 just raised it right now. I never thought about
17 it.
18 **Q. You never thought about that.**
19 A. No.
20 **Q. Did you read the addendum at the time**
21 **that you sent it to Kate's Paperie?**
22 A. Not -- maybe not at the time, but I've
23 read it, yes.
24 **Q. Did you read the addendum at the time**
25 **you sent the LOI to Kate's Paperie?**

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1 Werner

2 A. I don't recall.

3 Q. You intended to refer to the addendum in
4 the LOI, correct?

5 A. Yes.

6 Q. Did you -- and is it your testimony you
7 just didn't think about whether or not there might
8 be a conflict between the wording of a provision
9 in the LOI and the wording of a similar provision
10 in the addendum?

11 A. Not until you just brought it up.

12 Q. So it is your testimony that you just
13 didn't consider that possibility; is that correct?

14 A. I didn't. I didn't think about it, no.

15 Q. Is it your testimony now that you have
16 read -- strike that.17 MR. VARGA: We know that by now. He
18 read it.19 Q. Now that you have read it, and now that
20 in this deposition you have thought about it,
21 which should control?

22 A. I don't know.

23 Q. Okay.

24 A. I have no opinion on it, to be honest
25 with you.

1 Werner

2 that.

3 Q. Okay.

4 (Counsel conferred with his witness.)

5 Q. Did you have an expectation, in May of
6 2007, as to whether Kate's Paperie would interpret
7 the words of paragraph 8 of the LOI as controlling
8 over the basic terms of the Soho proposal in
9 Addendum A?

10 A. No.

11 I do not recall thinking about it in
12 that way.13 Q. Okay. Look at the Soho Proposal Basic
14 Terms page, please. It's in Addendum A.15 Now, what did you mean when you wrote,
16 "Right to terminate," that paragraph 3? What did
17 you mean in May of 2007, that that paragraph was
18 supposed to convey?19 A. Well, what I recall was the agreement
20 between Lionel and I, was that if things didn't
21 work out based on this financial model, he'd have
22 the right to terminate, unless Kolo was going to
23 pay \$140 per square foot plus 6 percent royalty,
24 which at the time he agreed that if you paid that,
25 then there would be no reason for him to

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1 Werner

2 Q. Okay.

3 MR. VARGA: I would also object to that,
4 of course, because that calls for a legal
5 conclusion, and that's for the courts to
6 decide. You know.7 Q. Now that you have read it, Mr. Werner,
8 and now that we've discussed it in this deposition
9 and you're aware of the issue, do you have a
10 preference as to which would control?

11 A. Not yet.

12 Q. Okay. Do you have an understanding
13 based on your background as a -- an executive of
14 Kolo, and a workout executive at Werner and Co.,
15 as to what ought to control here?

16 A. No. I don't have an understanding.

17 I -- you're asking me to make a judgment call on
18 something that I just -- today, right now, I don't
19 have a -- I'd have to get counsel's opinion on it.
20 I'm not an attorney.21 Q. Okay. You don't recall asking your
22 counsel at the time, that is in May of 2007, with
23 regard to any conflicting provisions of the LOI
24 and the addendum, do you?

25 A. I'm sorry, I don't. I don't remember

1 Werner

2 terminate. That's the intent of that. That was
3 an agreement I remember specifically talking to
4 him about.5 Q. Okay. When did you talk to him about
6 it?7 A. Oh. I really don't recall, but it had
8 to be during April, but I'm really not specific.
9 I don't really know.10 Q. Okay. Before you sent this proposal, I
11 take it.12 A. I don't know. I really don't know. I
13 can't remember.

14 Q. Where did you get the number 140?

15 A. Leonard Flax and Lionel Flax.

16 Q. Okay. So did that discussion take place
17 in April of 2007, when you walked through the Soho
18 store to look at the possible location for the
19 shop-in-shop?

20 A. Yes.

21 Q. And who was present?

22 A. Lionel Flax, Leonard Flax, and Peter
23 Dunn. And myself.

24 Q. The four of you.

25 A. Yes.

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1 Werner
 2 Q. And that was in April.
 3 A. Yes.
 4 Q. So that was -- does that refresh your
 5 recollection that it was before you sent the pages
 6 that are the addendum, as a proposal dated
 7 April 2007?
 8 A. I don't remember if we had sent this
 9 addendum or proposal to them before we met them at
 10 the -- at the store. I just don't remember.
 11 Q. Okay. So if you sent it before you met
 12 them at the store, you came up with the 140. Is
 13 that right?
 14 A. The only way I could have come up with
 15 the 140 is based on what they told me their
 16 current rental rate was. That's the only way I
 17 could come up with it. That I know came from the
 18 Flaxes.
 19 Q. At this walk-through meeting?
 20 A. I think it was at the walk-through
 21 meeting, yes.
 22 Q. So if the 140 came from them at the
 23 walk-through meeting, tell me how it could -- the
 24 140 could have gotten in here, if you sent the
 25 proposal before the walk-through meeting? I'm

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1 Werner
 2 confused.
 3 A. Yeah. I don't know if the -- that's
 4 what I was saying. I don't know if this proposal
 5 was sent to them before that meeting or after.
 6 I'd have to go back and look at my -- the time and
 7 dates.
 8 It's very possible. There was a time --
 9 Q. What's very possible?
 10 A. It's very possible that we had that
 11 meeting, and this number, \$140 per square foot,
 12 came from that meeting. It's very possible.
 13 Yup.
 14 Q. I agree that it's possible. Indeed, if
 15 the -- if the number 140 came from them, I think
 16 it's probable that the number 140 was discussed
 17 before you sent the proposal.
 18 A. No. That's not what I'm saying, because
 19 we have -- we had an ongoing dialogue. It didn't
 20 mean that it came from that meeting. That's what
 21 I'm saying.
 22 Q. Okay. Okay.
 23 Focusing on the walk-through meeting in
 24 April, where it was you and Peter Dunn for Kolo,
 25 and it was Leonard and Lionel Flax for Kate's, do

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1 Werner
 2 you recall other substantive discussions about the
 3 possible shop-in-shop arrangement at that
 4 walk-through meeting?
 5 A. After it, or during it?
 6 Q. During it.
 7 A. Subsequent, you used the word. Can you
 8 rephrase that? I thought you said subsequent.
 9 MR. VERSFELT: Let me have it read back.
 10 If it's confusing, I'll rephrase it.
 11 (Discussion off the record.)
 12 (The record was read back.)
 13 A. There was more discussions than the \$140
 14 per square foot at that meeting. We had more
 15 discussions involving the shop-in-shop.
 16 Q. What do you recall about those
 17 discussions?
 18 A. I remember Leonard discussing his
 19 expectations of what the shop-in-shop should be.
 20 Q. And what were those expectations that
 21 you recall?
 22 A. I remember him saying that he wanted to
 23 see Kate's create more shop-in-shops within that
 24 space, and that Kolo would be a nice addition to
 25 what he -- what he envisions Kate's will

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1 Werner
 2 eventually evolve to, shop-in-shops.
 3 He was very encouraging. I also
 4 remember Lionel being very specific about he
 5 was -- he was the person making the decision. And
 6 he referred to his father during that meeting,
 7 that he had the decision, and it was not
 8 necessarily his father. That was one thing.
 9 In addition, he also referred to how
 10 quickly we needed to move in order for this to be
 11 ready to be executed, by the time they opened up
 12 that store.
 13 Q. Anything else?
 14 A. There was other discussions about where
 15 Kate's was going and how they compete with Papyrus
 16 at the time, and how Kolo's shop-in-shop would
 17 benefit Kate's, by having a Kolo shop-in-shop, and
 18 Papyrus across the street wouldn't.
 19 We talked about how it was beneficial to
 20 Kolo to have the shop-in-shop in Kate's, because
 21 of the value that Kolo would receive by having a
 22 lot of retailers come through Kolo, and see --
 23 sorry, come through Kate's and see Kolo there.
 24 That was very significant. And we agreed to that.
 25 So there was a -- sort of a meeting of

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1 Werner
2 the minds of the mutual benefits of both parties.
3 Q. And was there a meeting of the minds
4 that if the arrangement wasn't working out, that
5 Kate's would have a right to terminate?
6 A. We never brought that up, in my
7 recollection, during that meeting. It never got
8 that far.
9 Q. Okay.
10 A. Okay.
11 Q. But either at that meeting or at some
12 point between that meeting and your submission of
13 the proposal of April 2007, you considered Kate's
14 right to terminate; isn't that right?
15 A. Yeah. I don't know how it came about,
16 but yes, of course, because it became -- it was in
17 the document.
18 Q. Because it's in Addendum A.
19 A. Yes.
20 Q. And am I correct that in accordance --
21 strike that.
22 Am I correct that the right to terminate
23 that you outlined in your Soho Proposal Basic
24 Terms would permit Kate the right to terminate the
25 agreement at any year, for as long as it lasted,

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1 Werner
2 A. It was either Kolo or Kate's, had the --
3 had the ability to terminate. That's my
4 understanding.
5 Q. Okay. How would Kate's terminate, as
6 you're saying Kate's had a right to terminate,
7 under that paragraph 8?
8 A. My understanding --
9 Q. That's what I'm asking about, your
10 understanding.
11 A. My understanding would be in the event
12 that any of these other terms in the LOI were not
13 followed by Kolo, that would allow them to
14 terminate. That's -- that was really my
15 understanding.
16 Q. Would it allow them to terminate at any
17 time?
18 A. I don't know, to answer your question.
19 I don't know. I never thought about it.
20 Q. There is no cure provision in this LOI,
21 is there?
22 A. I don't know what you mean by cure.
23 Q. Okay. I mean that if one party to the
24 LOI defaults under the terms, there is no
25 provision of the LOI that permits a time period

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1 Werner
2 so long as Kolo were not paying Kate's a minimum
3 of \$140 per square foot plus 6 percent royalty?
4 A. I believe that to be true, yeah.
5 Q. And the basic terms -- well, strike
6 that.
7 There's no right to terminate mentioned
8 in the LOI, is there?
9 A. Yeah, there is a reference here to
10 termination. Paragraph 8.
11 MR. VARGA: Plaintiffs 1.
12 A. Plaintiff's 1 refers to --
13 Q. Page 2 of Plaintiff's 1.
14 A. Yes. Refers to it.
15 Q. Where does it refer to it? Can you read
16 it.
17 A. Yes. "Kolo shall retain the right to
18 renew each sublease lease for an additional
19 one-year period, and each year thereafter, as it
20 becomes due, by giving 60-day notice to Kate's
21 prior to the termination date."
22 So that's the reference in terms of
23 termination.
24 Q. And how was the termination supposed to
25 work under that paragraph 8?

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1 Werner
2 for that defaulting party to cure its default.
3 A. It's not specific in this document.
4 Q. It's not even general in that document,
5 is it?
6 A. When I say specific, I don't know if
7 it's implied or not, but it's not specific.
8 Q. It's -- okay. You -- it's not explicit,
9 and you don't know whether it's implicit; is that
10 your testimony?
11 A. I believe that to be true.
12 Q. And it's not on -- okay. And -- but
13 your testimony is that Kate's would have a right
14 to terminate the shop-in-shop arrangement if Kolo
15 failed to abide by the terms of the arrangement.
16 A. LOI plus addendum, yes.
17 Q. Okay. The -- by terms of the
18 arrangement, I mean the LOI and the things set
19 forth in the addendum.
20 A. That's correct.
21 Q. Okay. So if Kolo was not complying with
22 the terms, then Kate's could terminate the
23 arrangement.
24 A. I -- yes. I guess that would mean it's
25 not explicit. It doesn't say it, but I would

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1 Werner
2 venture to say yes, that would be it.
3 Q. And that would be derived from just
4 general attitudes of fundamental fairness, if it
5 isn't set forth in the agreement itself, right?
6 A. If there was something specific that
7 Kolo was not doing that was spelled out in the LOI
8 and the addendum, I would agree that they probably
9 have the right to terminate, yes.
10 Q. And would they have a right to terminate
11 at the time of the default?
12 A. No.
13 Q. When would they have a right to
14 terminate?
15 A. It's unspecified.
16 Q. It doesn't say.
17 A. It does not say.
18 Q. So we don't know when they would have a
19 right to terminate.
20 A. That's right.
21 Q. Now, let's look at paragraph 4 of the
22 basic terms.
23 Could you read that, please.
24 MR. VARGA: Paragraph 4 --
25 Q. Of the basic terms, I'm sorry, of -- let

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1 Werner
2 A. Absolutely.
3 Q. And just for the record, what does POS
4 mean?
5 A. Point of sale.
6 Q. That means the point of sale in the Kolo
7 store.
8 A. That's correct.
9 Q. And I take it if Kate's can show you
10 that they're not able to access the monthly POS
11 data, you would take the position that you would
12 fix that.
13 A. If they can't -- if they cannot access
14 the POS data as we have given them in the past, I
15 would absolutely fix it.
16 Q. Okay. And looking at paragraph 5,
17 please --
18 A. Okay.
19 Q. -- it says, Kate's will pay monthly
20 rental payments.
21 MR. VARGA: Kolo.
22 Q. I'm sorry, it says, "Kolo will" Kate --
23 "will pay Kate's monthly rental payments according
24 to the financial proposal enclosed."
25 Did I read that correctly?

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1 Werner
2 me rephrase my question. I'm looking at the page
3 of Addendum A entitled Soho Proposal Basic Terms.
4 MR. VARGA: Thank you.
5 Q. I would like you to look at paragraph 4,
6 please.
7 A. Okay.
8 Q. Could you read it?
9 A. "Kolo will provide Kate's with monthly
10 POS data."
11 Q. Has Kolo provided Kate's with monthly
12 POS data since June 1 of 2007?
13 A. Up until yesterday, I believe we did.
14 According to Lionel's testimony was the first time
15 that I heard that he was unable to go and get the
16 POS, as we arranged for him to do that.
17 Q. Okay.
18 A. Okay?
19 (Counsel conferred with the witness.)
20 A. Yeah. Well, I don't know -- I say never
21 notified.
22 Q. So I take it that, as you sit here
23 today, you have been under the impression that
24 Kate's had been able to receive Kolo's monthly POS
25 data.

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1 Werner
2 A. Yes.
3 Q. And what's the financial proposal that
4 it refers to?
5 A. Exhibit-- Plaintiff's Exhibit 1.
6 Q. Let me help you. Is it the next page
7 following the basic terms page?
8 A. Yes.
9 MR. VARGA: Just call the title.
10 A. Okay, financial proposal.
11 Q. Financial proposal page. It comes
12 immediately following the basic terms page.
13 And so Kolo, under the basic terms,
14 commits to pay monthly rental payments in
15 accordance with the page that follows. Correct?
16 A. Yes.
17 Q. Okay. And the starting rent per square
18 foot is?
19 A. \$75 per square foot.
20 Q. Okay. Is that to be paid monthly?
21 A. Yes.
22 Q. Okay. The starting royalty on the
23 financial proposal. The paragraph 2 on the
24 financial proposal, it says, "Starting royalty,
25 6 percent."

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Werner

A. Yes.

Q. Is that in -- does that tie in to paragraph 6 on the basic terms page?

A. Yes.

Q. So that the starting royalty is 6 percent, according to the basic terms.

A. Yes.

Q. And that's 6 percent of what? Kolo sales?

A. Net sales. Net sales, Kolo net sales.

Q. 6 percent of Kolo net sales.

A. Yes.

Q. Okay. Has Kolo been paying a royalty to Kate's?

A. We've been -- we've been escrowing it. We've been giving it to our attorney.

Q. I'm not talking about rent. I'm talking about royalty.

A. We have, yes.

Q. You've been paying a royalty to your attorney, as best that you know.

A. As best that I know.

Q. Let me put before you as -- let me put before you, Mr. Werner, an exhibit that I believe

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Werner

Q. Well, he refers explicitly to, quote, monthly rental payments for the Spring Street shop, end quote, doesn't he?

A. He does, but he doesn't state that those were the only payments, so I don't know. I'm just saying, I don't know if he left that out, if there was some type of error on his part. I don't know if there's been an error on our part. I'm not sure.

Q. Well, let me ask it this way, just so we don't avoid some huge misunderstanding between our parties.

I take it your testimony is, that at the very least, Kolo is obligated to pay 6 percent royalty on net sales at its store in Kate's Soho shop, that it is either paying those royalties to Kate's to this day, or paying those royalties into escrow.

A. It states in the financial proposal that at the net sales of 250,000, that Kolo is required -- up to 449 -- \$449,000, Kolo will be paying 6 percent. It does not state, from the very beginning, that we will pay 6 percent should we not reach -- regardless of us reaching less

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Werner

will be Defendant's Exhibit F. It's a two-page document.

(Two-page document was marked Defendant's Exhibit F for identification, as of this date.)

Q. Please take a look at it, so you can tell me what it is.

A. Uh-huh.

(The witness read.)

A. Okay.

Q. Okay. Does this two-page exhibit state what Kolo is paying into escrow with regard to the Spring Street store?

A. It only refers to the monthly rental payments.

Q. Yes. And do you know why it only refers to the monthly rental payments?

A. I don't know why.

Q. Okay. Could it be because the only moneys you're paying into escrow are the monthly rental payments?

A. It could be, but I don't think it is. I don't think our attorney is referring to all payments, but I would have check on that.

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Werner

than 250,000.

Q. Okay. First let me deal with that point.

A. Okay.

Q. Have you met \$250,000 in net sales in the Kolo shop in the Soho location?

A. No.

Q. Okay.

MR. VARGA: As of when?

Q. As of today.

A. I don't -- I have to check on that. It's -- it's -- not certain. Could be pretty close, though.

Q. Okay. Now let's go back. If the royalty -- well, this financial proposal does not say, does it, that the royalty rate of 6 percent is to begin only after net sales of \$250,001, does it?

A. No.

Q. In fact, it says starting royalty, 6 percent, in paragraph 2.

A. I would disagree. It says royalty increases --

Q. In paragraph 3.

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1 Werner
2 A. Right.
3 Q. What does paragraph 2 mean?
4 A. Paragraph 2 just states the starting
5 royalty.
6 Q. Well --
7 A. But it doesn't --
8 Q. Go ahead.
9 A. It doesn't state when it's calculated.
10 Q. What does the word "starting" mean to
11 you?
12 A. When we hit \$250,000.
13 Q. Okay. Then why are there two
14 paragraphs, a paragraph 2 and then a paragraph 3?
15 A. I don't know why.
16 Q. You wrote this, didn't you?
17 A. I collaborated on it, yes.
18 Q. Fair enough. And it does not -- we can
19 agree, can't we, that there is nothing in
20 paragraph 2 that explicitly says that the
21 6 percent royalty doesn't kick in on Dollar 1?
22 A. It doesn't say whether it does or it
23 doesn't, correct.
24 Q. Right. And you wrote it or collaborated
25 on it, and -- and paragraph 2 does use the word

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1 Werner
2 Q. Oh, well, we'll look at those e-mails.
3 A. Okay.
4 Q. Let me put before you, Mr. Werner, two
5 exhibits from yesterday's deposition that you
6 attended.
7 A. Uh-huh.
8 Q. Plaintiff's Exhibit 3 and Plaintiff's
9 Exhibit 4.
10 A. Uh-huh.
11 Q. Okay. Let me direct your attention to
12 the e-mail that -- let me use my finger, if I may.
13 Let me point to this e-mail that starts with
14 "Lionel." It's on Plaintiff's Exhibit 3, that is
15 page KP 0124, just below the word "cool."
16 Okay?
17 A. Uh-huh.
18 Q. Now, is it the case that you sent that
19 e-mail that I'm directing your attention to on or
20 about August 20, 2007?
21 A. It appears I did.
22 Q. Does that e-mail say anything about your
23 not having to pay royalties until you reach
24 250,000 in sales?
25 A. It doesn't -- it's not specific.

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1 Werner
2 "starting" in the two-word paragraph, "Starting
3 royalty," doesn't it?
4 A. It's redundant. It's redundant.
5 Q. Which is redundant?
6 A. It's redundant from paragraph 2, and in
7 paragraph 3.
8 Q. It's only redundant, sir, if the way you
9 were interpreting it today is the way that it was
10 intended in May of 2007. Isn't that right?
11 A. It's not --
12 Q. Will you answer that question, please.
13 A. No. I was going to ask you to rephrase
14 it, because I don't know what you --
15 Q. Okay, let me rephrase it this way. It's
16 not redundant at all, is it, if the starting
17 royalty is supposed to be 6 percent from Dollar 1?
18 A. If that's when it was -- if that is how
19 you're interpreting it, yes. I don't believe
20 that's how the parties agreed to it.
21 Q. How do you know?
22 A. I know that because of Lionel's request
23 to me in several of the e-mails we saw today, that
24 he was not expecting a royalty during the first
25 months, because we did not hit 250,000.

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1 Werner
2 Q. It was when Lionel was asking for
3 royalties, wasn't it?
4 A. Uh-huh.
5 Q. And you didn't respond to him saying,
6 Oh, but Lionel, there -- you've misunderstood, we
7 don't pay royalties in 250,000 net sales, did you?
8 A. I did tell him that, according to the
9 financial proposal, we had to be at \$250,000.
10 Q. Where did you tell him that?
11 A. I told him on the phone.
12 Q. Oh, and here, what did you say here?
13 You want to read it into the record?
14 A. Sure, I would be happy to read it.
15 Q. Sure.
16 A. "You're welcome. At the end of this
17 month, we will be looking to make a royalty
18 payment according to our recent agreement to pay
19 royalties on a quarterly basis, according to
20 minimum annual sales in the proposal."
21 So based on that, we were going to
22 evaluate it each quarter. That's my intention in
23 that e-mail.
24 Q. Okay. And what did you mean by the
25 phrase "at the end of this month"? This was

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1 **Werner**
2 **August 20, remember.**
3 A. Yes.
4 Q. Okay.
5 A. What do you mean? What -- I'm sorry,
6 rephrase?
7 MR. VERSFELT: Okay. Off the record.
8 (Discussion off the record.)
9 Q. Okay. You see in that --
10 MR. VARGA: Just before you have a
11 question.
12 MR. VERSFELT: Whoa, whoa, whoa.
13 There's a question pending.
14 MR. VARGA: I'm sorry, I thought there
15 was no question.
16 MR. VERSFELT: I believe there is.
17 Let's -- I want to make sure.
18 (The record was read back.)
19 Q. I assume you've read this, Mr. Werner.
20 Your lawyer is telling you to read it?
21 A. Yeah.
22 Q. Sure. My question to you is, in your
23 e-mail of August 20 to Lionel, where you say, "At
24 the end of this month we'll be looking to make a
25 royalty payment," is that because you thought you

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1 **Werner**
2 A. Should we be, according to the financial
3 proposal, at \$250,000 of sales.
4 Q. Yeah. Let's look at the core terms, the
5 immediately preceding page. When does it say
6 you're supposed to pay royalty payments? I'll
7 help you, it's in paragraph 6.
8 MR. VARGA: Which one?
9 Q. In the basic terms, paragraph 6.
10 A. "Kolo will pay Kate's monthly royalty
11 payments according to the financial proposal."
12 Q. Right.
13 A. Okay.
14 Q. Monthly, right?
15 A. Yes.
16 Q. Okay.
17 A. But Lionel and I discussed quarterly and
18 so he agreed to it.
19 Q. Right. Because he was saying in August,
20 Where is my royalty check?
21 A. No, he wasn't saying that. I disagree
22 with you. That's not what he was saying. I don't
23 believe he ever stated a reason, a case, any
24 substantial statement that says, You owe me
25 royalty payments.

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1 **Werner**
2 would have 250,000 in net sales before the end of
3 August?
4 A. It's possible, yes.
5 Q. You thought that?
6 A. Yes.
7 Q. Did you get point of sale data on a
8 weekly basis when you moved into that
9 shop-in-shop?
10 A. Absolutely. Daily basis.
11 Q. So you knew where your sales were.
12 A. That's correct.
13 Q. And your sales, you just finished
14 telling me a few minutes ago, may not be at
15 250,000, even now, which is what, six months late?
16 A. So what you're saying -- what I'm saying
17 is that we were launching the album bar, and that
18 could have increased the sales substantially.
19 Q. Did you mention the album bar in this?
20 A. No, I did not.
21 Q. So, and -- you said you were going to
22 pay royalties on a quarterly basis in accordance
23 with the proposal. Right? It's in your e-mail.
24 A. Yeah.
25 Q. That's what you wrote.

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1 **Werner**
2 Q. Well, what about an unsubstantial
3 statement, sir? You're responding to him and
4 saying you expect to pay royalty payments on a
5 quarterly basis. That would be June, July and
6 August. Right? You're telling him on August 20,
7 that you expect to be paying royalty payments
8 soon.
9 Now, I've heard your testimony today --
10 well, let me put that into a question. Were you
11 telling him on August 20 that you expected to pay
12 royalty payments soon?
13 A. I was telling him that should we receive
14 sales in the -- in the neighborhood of 250,000 or
15 more, we would do that, yes. Absolutely.
16 Q. And you thought that your sales on
17 August 20 had a possibility of reaching 250,000
18 net sales by the end of the quarter.
19 A. It's possible.
20 Q. In ten days, when you haven't reached
21 250,000 net sales in the five months since then.
22 A. I didn't say ten days. I'll also point
23 out that this was a recent agreement, that he and
24 I came to, on a quarterly basis. So he was fine
25 with quarterlies.

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1 Werner
 2 Q. You agreed with him to modify the -- the
 3 basic terms of the Soho proposal, didn't you?
 4 A. That was -- that was what he asked me, I
 5 agreed to it, yes. Absolutely.
 6 Q. And there's nothing in the LOI that says
 7 it can't be modified by verbal understanding, is
 8 there?
 9 A. No.
 10 Q. Do you know what a merger clause is?
 11 A. No.
 12 Q. There's no -- you may feel free to look
 13 through the first two pages. There's nothing in
 14 it that says it cannot be modified by the parties,
 15 except in a writing. Is there?
 16 A. Not that I can see, no.
 17 Q. And there's nothing in the proposal, the
 18 Addendum A, that says it cannot be modified by the
 19 parties; isn't that right? By mutual agreement.
 20 A. It doesn't say anything like that.
 21 Q. Right. So at any time, Kate's and Kolo
 22 could verbally agree to change the terms of
 23 Plaintiff's Exhibit 1; is that correct?
 24 A. We agreed to change --
 25 Q. That's not my question. I can have it

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1 Werner
 2 read back, but I would like an answer to my
 3 question.
 4 A. Read back, please.
 5 MR. VERSFELT: Please.
 6 (The record was read back.)
 7 A. I don't know if that's correct. It
 8 doesn't state whether we could or we can't. It
 9 doesn't say.
 10 Q. It doesn't say you can't.
 11 A. And it doesn't say you can.
 12 Q. And you did, with regard to royalty
 13 payments. Isn't that right?
 14 A. We came to an agreement, I think, that
 15 agreed to -- to make quarterly royalty payments,
 16 yes.
 17 Q. You changed the terms of the --
 18 A. Based on a minimum annual sales as
 19 stated in the proposal. That's what I was saying.
 20 Q. You changed the basic terms of the
 21 agreement, from monthly to quarterly --
 22 A. Upon his request, I agreed to make
 23 quarterly payments.
 24 Q. Answer my question, please.
 25 A. Yes.

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1 Werner
 2 MR. VARGA: He did.
 3 Q. Is it correct that you changed the terms
 4 of the LOI and the addendum, by mutual agreement
 5 with Lionel, subsequent to the execution of the
 6 LOI?
 7 A. Yes.
 8 Q. Okay. And you did so without a writing.
 9 A. No, because there's the writing right
 10 there, in e-mail.
 11 Q. No. That records that you and he --
 12 A. No, that's the writing. That's the
 13 writing.
 14 Q. Okay. So you could do it by e-mail. So
 15 you could do it by e-mail, right, sir?
 16 A. That's right.
 17 Q. Okay.
 18 MR. VARGA: Just to clarify, you -- you
 19 used the word "you changed," but he testified
 20 that to -- you mean to ask, you, as in him
 21 himself, and nobody else, or including
 22 Lionel? Because it came at Lionel's request.
 23 So if -- to the extent you're trying to
 24 paint a picture about something else, so I
 25 just want to clarify, when you said you

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1 Werner
 2 personally, as opposed to including Lionel.
 3 Q. Who made the agreement to modify the
 4 royalty payment schedule from monthly to
 5 quarterly?
 6 A. Both Lionel and I.
 7 Q. Thank you.
 8 A. You're welcome.
 9 Q. Now, where was I?
 10 Paragraph 7 of the basic terms. You
 11 have the basic terms, okay, paragraph 7.
 12 "Kate's will provide" -- could you read
 13 it, please.
 14 A. "Kate's will provide Kolo with
 15 landlord's consent to the sublease and"
 16 non-disturbance -- "and a non-disturbance."
 17 Q. Okay. Did you ever get a landlord's
 18 consent that you saw?
 19 A. Not that I've seen.
 20 Q. Did you ever get a non-disturbance?
 21 A. Not that I've seen.
 22 Q. What did you mean by non-disturbance?
 23 A. I don't know. That's what I got from
 24 our attorney. He told me to make sure it's in
 25 there.

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Werner

1 Q. Okay. So now we're looking -- I would
2 like to direct your attention to the financial
3 proposal page.

4 I think we went over the first couple
5 paragraph. The starting rent per square foot, you
6 testified, was \$75 per month.

7 A. Yes.

8 Q. Okay. The starting royalty, I
9 understand your testimony is, you believed at the
10 time it meant, once net sales got above 250,000,
11 you would owe 6 percent.

12 A. I believe that to be true.

13 Q. Yes. And once net sales got to \$650,000
14 and higher, you would pay 11 percent royalty; is
15 that correct?

16 Your lawyer is putting another exhibit
17 in front of you.

18 MR. VARGA: Plaintiff's 4.

19 Q. Okay. Now, I've directed his attention
20 to the financial proposal that is in
21 Plaintiff's 1, so I would like you to focus your
22 attention on that page, Mr. Werner, please.

23 Okay?

24 A. Go ahead.

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Werner

1 sorry.

2 MR. VERSFELT: Let the record reflect
3 that counsel is conferring with the witness.

4 Q. Are you finished conferring with your
5 counsel, Mr. Werner?

6 A. Yeah. You have to clarify whether the
7 per square foot is by per month or per year. We
8 anticipated it to be per year.

9 Q. Well, Mr. Werner, I know you just
10 finished discussing this issue with your counsel,
11 and I know your counsel put Plaintiff's Exhibit --

12 MR. VARGA: 4.

13 Q. -- 4, in front of you, and pointed to
14 the e-mail that he wanted you to read.

15 But sir, you have testified several
16 times this morning, not just now, but earlier,
17 before lunch, that you believed at the time it was
18 75 square foot per month.

19 A. No, I did not. Absolutely did not.

20 Q. Can we just rely on the transcript on
21 that?

22 A. No, we cannot. I'll clarify it again,
23 there's no way that I would have agreed, and
24 should I have agreed, the market rent is not \$140
25

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Werner

1 Q. Okay. Now, what would the royalty be --
2 rate be, as set forth in paragraph 3, of the
3 financial proposal for sales of \$651,000?

4 A. 11 percent.

5 Q. Now let's look at the rent increases
6 that are set forth.

7 Does paragraph 4, entitled Rent
8 Increases, set forth a graduated scale of
9 increasing rent based on net sale volumes that
10 increase?

11 A. Yes.

12 Q. And does it get as high as \$140 per
13 square foot monthly?

14 A. No.

15 Q. Why not?

16 A. I don't know why.

17 Q. Okay. It goes up -- just so we're
18 clear, it starts at \$75 per square foot, monthly,
19 and goes up to \$135 per square foot per month.

20 A. Uh-huh.

21 Q. And then it stops. You have no
22 recollection as to why 140 isn't included there?

23 A. I have no recollection why.

24 Q. Okay. Do you think it was included --
25

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Werner

1 per square foot per month.

2 Q. Okay, let me ask it this way.

3 A. Sure.

4 Q. Can you find on the financial proposal
5 page, which you and your lawyer wrote, can you
6 find the words "per year" on that?

7 A. Nor do --

8 Q. Can you find --

9 A. No.

10 Q. Yes or no?

11 A. No.

12 Q. No. Can you find the word "annually"?

13 A. No.

14 Q. Can you find any word on there to
15 indicate that the dollar amounts given for rent
16 are other than monthly?

17 A. Doesn't state.

18 Q. It doesn't. Okay.

19 Now turn back to the prior page, please.

20 The Soho Proposal Basic Terms.

21 Now, could you read me paragraph 5.

22 A. "Kolo will pay Kate's monthly rental
23 payments according to the financial proposal
24 enclosed."
25

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1 Werner
 2 Q. Does that say monthly?
 3 A. It says monthly rental payments. It
 4 doesn't say per square foot per month. That's a
 5 major difference.
 6 Q. It does say monthly rental payments,
 7 does it?
 8 A. It says monthly rental payments.
 9 Q. And then when you turn the page, it
 10 says, "The starting rent per square foot is \$75."
 11 A. But there's no relevance to that.
 12 Absolutely no relevance. No one in their right
 13 mind would pay \$75 per month at the present time
 14 the market rent as stated by your client was \$140
 15 per year. Per square foot.
 16 And I would ask that your client clarify
 17 that, because that's what I agreed to and that's
 18 what they agreed to.
 19 Q. Well, Mr. Werner, you wrote this. You
 20 and your lawyer wrote this. Right?
 21 A. Go ahead.
 22 Q. Yes or no?
 23 A. We drafted it.
 24 Q. You and your lawyer prepared this Soho
 25 Proposal Basic Terms and the financial proposal

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1 Werner
 2 page. Correct?
 3 A. Yes.
 4 Q. And you sent it to Kate's, correct?
 5 A. Yes.
 6 Q. All right. And you -- and Kate's didn't
 7 write it, right?
 8 Kate's didn't write the starting rent
 9 per square foot, paragraph 1, on your financial
 10 proposal, did it?
 11 A. They didn't write anything. They didn't
 12 change anything.
 13 Q. They didn't.
 14 A. We didn't change anything.
 15 Q. That's right.
 16 A. And that's what they will agree to, that
 17 was \$140 per square foot per year. I can tell you
 18 with definitively that's what we agreed to.
 19 Q. I'm not talking about the \$140 per
 20 square foot in the termination provision. I'm
 21 talking about 75 per square foot in the financial
 22 proposal, paragraph 1.
 23 A. Per year.
 24 Q. So your testimony, now that you've
 25 discussed it with your counsel, is that those are

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1 Werner
 2 per year numbers.
 3 A. \$75 per year, per square foot, was the
 4 factor that we used to arrange for the monthly
 5 payment. That's what we agreed to, that's what
 6 we've been paying, from June till the time up
 7 until, you know, whatever the -- our attorney
 8 said.
 9 Q. Yeah.
 10 A. Yeah.
 11 Q. And you saw the e-mail yesterday where
 12 Lionel Flax said, That seems way off, didn't you?
 13 A. I don't recall that. Maybe you want to
 14 show me that.
 15 Q. Sure.
 16 MR. VARGA: You're referring to
 17 Plaintiff's 4, or which one is it?
 18 MR. VERSFELT: I don't know. You've got
 19 them over there.
 20 MR. VARGA: Because Plaintiff's 4 talks
 21 about --
 22 MR. VERSFELT: Well, this -- let me see
 23 if this is the one.
 24 MR. VARGA: That way off language? I
 25 don't know. I don't recall the way off

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1 Werner
 2 language. I think that was his
 3 characterization.
 4 MR. VERSFELT: No, here it is.
 5 Q. Allow me. He said, "Entirely off."
 6 The rent check that he received was
 7 entirely off.
 8 A. Uh-huh.
 9 MR. VARGA: Would you read it, please.
 10 Plaintiff's 4.
 11 A. Sure.
 12 "Can you let me know how you're deriving
 13 at that number? It seems entirely off in terms of
 14 dollars per square foot."
 15 Q. Right. Now --
 16 A. And I clarified it.
 17 Q. Yes, you responded, I know. And you may
 18 feel free to read the rest of the e-mail string,
 19 which we went over yesterday in the deposition of
 20 Mr. Flax.
 21 MR. VARGA: So go ahead. Read it.
 22 Q. Let me know when you've read it.
 23 A. I understood this to be an agreed-upon
 24 amount. I was not involved in the discussions
 25 regarding rent.

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1 Werner

2 MR. VARGA: Just for the record, please
3 identify --

4 A. This is an e-mail from Kim Hassler to
5 Lionel.

6 Q. Right.

7 A. And then above that, I wrote: Kim and
8 Lionel, the base rent is determined at \$75 per
9 square foot, at \$450. 450 square feet. It would
10 come to 33,750 per year, and 2,812.5 per month.

11 I don't see any discrepancy in that.

12 MR. VARGA: Please finish the e-mail.
13 Plaintiff's 4.

14 A. Okay. Then -- Lionel writes, "Okay, I
15 understand. I guess what threw me was the fact
16 that the first check was substantially higher than
17 the second. I forgot the first was for two
18 months. Thank you most kindly."

19 We were in agreement --

20 Q. And we got Lionel's testimony on that
21 same exhibit yesterday.

22 A. We were in agreement that it was a per
23 square foot per year factor that was in the
24 proposal.

25 Q. How do you know that?

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1 Werner

2 A. Yeah.

3 Q. Is that right?

4 A. That's right.

5 Q. Is that another modification to the
6 agreement?

7 A. No.

8 Q. It's not.

9 A. No.

10 Q. But it's a clarification, you concede.

11 A. Absolutely.

12 Q. Now, what dollar sales would Kolo have
13 to have in the Soho street store to pay \$140 per
14 square foot --

15 A. It wasn't specified.

16 Q. -- in rent?

17 It wasn't specified. It's in the
18 proposal.

19 A. It's not in the proposal.

20 Q. So that -- we don't know.

21 A. Right.

22 Q. Okay. But at least we know it has to be
23 more than 750,000.

24 A. Not necessarily.

25 MR. VARGA: I'm sorry, why did you get

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1 Werner

2 A. Because he stated it there.

3 Q. In August.

4 A. He stated it there, and he stated it --

5 Q. In August. Right?

6 A. Yeah, right there.

7 Q. Exhibit -- Plaintiff's Exhibit 4, I
8 believe it's August. If I may, let me just check
9 the dates.

10 Yeah, we're talking August 17, and -- I
11 guess the entire string is on August 17.

12 MR. VARGA: It's on Plaintiff's 3, the
13 bottom message, which is connected with
14 Plaintiff's 4.

15 Q. So on August 20. The entire string is
16 August 17 and August 20.

17 So August 17 and August 20, he clarified
18 that. Is that your testimony?

19 A. Yeah. There was no discussion after
20 that.

21 Q. There was no discussion before that.

22 A. There wasn't anything after that,
23 either.

24 Q. Okay. So it was clarified on August 20,
25 or thereabouts.

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1 Werner

2 750?

3 Q. Well, I'm looking at the rent increases
4 schedule under the financial proposal page. You
5 see how the rent increases there go from \$75 per
6 square foot up to 135.

7 A. Yes.

8 Q. 140 is higher than 135.

9 A. Yes.

10 Q. Can you tell me how -- well, so I'm
11 assuming, and I make clear, it's only an
12 assumption, that the net sales of Kolo, to meet
13 the rent increase of 140 square foot, would have
14 to be higher than 750,000 per year.

15 Is that a fair interpretation of this
16 schedule that you and your lawyer prepared?

17 A. With the exception that Kolo renews
18 going forward, we said that we would bring it up
19 to 140, despite the sales.

20 Q. So that when the one-year renewal
21 rate -- date approaches here this spring, you're
22 either going to make your payment of 140 per
23 square foot --

24 A. Per year.

25 Q. -- or Kate's can terminate it.

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1 Werner
2 A. Plus 6 percent.
3 Q. Right. So you're going to pay 140 per
4 square foot, plus 6 percent, regardless of your
5 level of sales, or regardless of the rental owed
6 according to the financial proposal, or Kate's has
7 the option of terminating your lease, your
8 arrangement. Strike that.
9 Or Kate has the option of terminating
10 the arrangement.
11 A. Yes.
12 MR. VERSFELT: Could I have the question
13 and answer read back. I just want to make
14 sure that -- just want to make sure that it
15 flowed smoothly.
16 (The record was read back.)
17 MR. VERSFELT: Please strike the whole
18 question, because I don't think it flows.
19 MR. VARGA: Well --
20 MR. VERSFELT: I move to strike. I'll
21 restate it.
22 MR. VARGA: It's not on the record that
23 he moved to strike.
24 MR. VERSFELT: Pardon?
25 MR. VARGA: I don't know if you have the

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1 Werner
2 ability to simply have that deleted.
3 MR. VERSFELT: I'm going to restate it.
4 It's going to be different, and it's going to
5 take out my little addendum in the middle.
6 MR. VARGA: Right.
7 Q. So Mr. Werner, if -- if there is a lease
8 under the terms of Plaintiff's Exhibit 1, then
9 when May 31 of this year rolls around, Kolo is
10 going to have paid \$140 per square foot, plus
11 6 percent royalty, or Kate's will have the
12 authority to terminate the arrangement. Is that
13 correct?
14 A. You're not being specific. It's \$140
15 per square foot, per year, plus 6 percent. That's
16 what we would -- we will do. Once you -- income.
17 MR. VARGA: Well, his question was, if
18 you don't -- if you don't do those, what's
19 going to happen? Am I in --
20 MR. VERSFELT: Yeah.
21 MR. VARGA: If you --
22 Q. And you agreed, you will either do that,
23 or Kate's has the authority to terminate --
24 A. Has the right to terminate.
25 Q. Has the right to terminate.

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1 Werner
2 A. That's right.
3 Are we clear about the \$140 per square
4 foot per year?
5 Q. Oh, no, on the 140? We're not clear
6 about the dollar numbers on the square foot. No,
7 not at all. I mean, we had testimony yesterday,
8 and then we had testimony today, that was all
9 consistent, and now we've had some inconsistent
10 testimony, and a few, in the last half hour.
11 But we'll just have to agree to disagree
12 on that.
13 (A recess was taken.)
14 Q. Mr. Werner, let's finish up with
15 Plaintiff's Exhibit 1.
16 Looking at the page that's entitled
17 Financial Forecast. I think it's the third page
18 from the back. Right? You have it, right?
19 MR. VARGA: Yeah. The one that reads on
20 top, Financial Forecast.
21 Q. And it sets forth escalations -- well,
22 tell me what this page sets forth.
23 A. This is a schedule that shows, as
24 revenue increases, so does rent per square foot,
25 per year, and so does royalty per year.

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1 Werner
2 Q. Okay. Does it say -- does it say --
3 well, in May of 2007, what did you think the
4 sales, annual retail sales, of the Kolo
5 shop-in-shop would be after a year, say?
6 A. What did I think?
7 Q. Yeah. What did you expect that
8 shop-in-shop was going to do in sales once it got
9 established?
10 A. Within 12 months we were expecting to do
11 250,000. That was the whole reason why Kate's
12 wanted us to do that, because they had never
13 received revenues from Kolo in retail sales more
14 than \$150,000.
15 Q. So \$250,000 in retail sales, in the Kolo
16 shop-in-shop, was going to be a success, by your
17 thinking.
18 A. Success? I don't think that I would
19 describe it or define it as a success, no.
20 Q. Well, you just told me you expected it
21 was going to be \$250,000 in annual retail sales.
22 A. But that doesn't mean it's a success.
23 Q. Okay. Where -- let me ask it this way:
24 If you hoped at the end of a year you would have
25 250,000 in retail sales, why did you have five

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Werner

1 annual retail sales numbers on this financial
2 forecast that are all significantly higher than
3 \$250,000?

4 A. I don't understand your question.

5 Q. Okay. If you hoped after a year that
6 the annual retail sales of the shop-in-shop might
7 hit 250,000, why did you start with 250,000 on
8 this financial forecast, and run this financial
9 forecast up to 350, then 450, then 550, then 650
10 and then \$750,000?

11 A. Because that was minimum that we agreed
12 to between the two companies, that we minimally
13 had to do.

14 Q. You mean if you don't do \$250,000 in
15 retail sales in the first year, then what happens?

16 A. Then both parties probably wouldn't
17 expect to move forward, or we would reevaluate the
18 shop-in-shop concept.

19 Q. So if -- well, where in Plaintiff's
20 Exhibit 1 does it say that?

21 A. It doesn't.

22 Q. It doesn't. But your understanding of
23 the arrangement was that that was a part of the
24 thinking of both parties.
25

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Werner

1 wouldn't it?

2 A. No.

3 Q. Well, let's look back at the core terms
4 page again.

5 A. Uh-huh.

6 MR. VARGA: Which one? Basic terms.

7 Q. The basic terms page for the Soho
8 proposal, paragraph 3.

9 Your testimony today is that the
10 6 percent royalty doesn't kick in until you have
11 250,000 in sales, correct?

12 A. That's correct.

13 Q. In annual sales.

14 A. That's correct.

15 Q. And yet the -- and -- strike that.

16 And the right to terminate provision
17 says that you have to pay a minimum rental, plus
18 6 percent royalty, correct?

19 A. Yes.

20 Q. Okay. If you're not paying a 6 percent
21 royalty, does Kate's Paperie have a right to
22 terminate whatever the arrangement is?

23 A. According to this paragraph 3, they --
24 if we do not pay \$140 per square foot year, plus
25

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Werner

1 A. That was what I would say was the
2 thinking of both parties, yes.

3 Q. Yeah. So that the -- the parties could
4 get together as you approached one year in the
5 space, and if the financial forecast number was
6 not -- or -- strike that.

7 So the parties could get together, as
8 you approached a year in the space, and they could
9 decide whether or not the arrangement was
10 financially beneficial --

11 A. No. That's not what I'm saying.

12 Q. Then tell me again what you meant by
13 your prior answer.

14 A. What I meant by my prior answer was that
15 both parties wanted to see the shop-in-shop
16 minimally do 250,000. But it had no -- it had no
17 bearing on whether or not they had the right to
18 terminate or we had the right to terminate.

19 It was an expectation, where both
20 parties said, We'd be happy -- both of us would be
21 happy if we started at 250 and moved it up.
22 Anything less than that would be less desirable.

23 Q. Yes. And anything less than that would
24 trigger Kate's Paperie's right to terminate,
25

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Werner

1 6 percent annual royalty, then they have the right
2 to terminate.

3 Q. Okay. What would the 6 percent annual
4 royalty be paid on?

5 A. On the sales. On the net sales.

6 Q. On what --

7 A. Any net sales.

8 Q. Any net sales. Okay.

9 A. Yes.

10 Q. So that for purposes of this
11 right-to-terminate provision, the calculation to
12 be done at the end of the -- or near the end of
13 the first year, would be to calculate \$140 per
14 square foot rental, plus 6 percent royalty, on all
15 the sales from Dollar 1, and if Kolo didn't pay
16 that, then Kate's would have a right to terminate.
17 Is that correct?

18 A. You -- you should rephrase that, because
19 I don't know what you mean by Dollar 1.

20 Q. Okay. What I mean by Dollar 1 is --

21 MR. VARGA: You also used "all."

22 MR. VERSFELT: Fine.

23 Q. There are -- as I understand it, and I
24 think our -- your testimony today is -- confirmed
25

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1 Werner
2 this, there are two components in terms of dollars
3 to the right to terminate, as you set forth on the
4 basic terms page of the Soho proposal that is
5 Addendum A. Okay? Two components.
6 A. Uh-huh.
7 Q. The first component is, \$140 per square
8 foot.
9 A. Annual per square foot.
10 Q. For purposes of this question, I'm not
11 going to argue with you. It's -- it's annual per
12 square foot this afternoon to you, so that's fine
13 with me.
14 And the other component is 6 percent
15 royalty.
16 A. Annual -- 6 percent on the sales in the
17 one year, yes.
18 Q. Okay. Now, when 6 percent royalty paid
19 on your sales during that year.
20 A. That's correct.
21 Q. Okay. That's what I meant by Dollar 1.
22 A. Okay.
23 Q. It's 6 percent royalty. If you have
24 only \$60,000 of sales that year, the royalty
25 required to avoid the right to terminate is

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1 Werner
2 6 percent of that 60,000 net sales.
3 A. Yes.
4 Q. Okay. And if it were a hundred thousand
5 dollars net sales, it would be 6 percent of that
6 hundred thousand dollars net sales.
7 A. Yes.
8 Q. And if it were \$249,000 net sales, it would
9 be 6 percent of that.
10 A. Yes.
11 Q. So that's what I meant by, from first
12 dollar.
13 So that even if the financial proposal
14 says that somebody's percent rate kicks in at 250
15 to 449 --
16 A. Uh-huh.
17 Q. -- then Kolo has to pay 6 percent on the
18 dollars below 250,000 to avoid its right to
19 terminate.
20 A. I agree with that.
21 Q. Okay.
22 I agree, you agree.
23 A. We finally agree.
24 Q. Now, who at Kolo would know whether or
25 not you have paid any royalties to Kate's Paperie

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1 Werner
2 since May of 2007?
3 A. Our accounts payable department.
4 Q. And who might that be?
5 A. Our accounts payable administrator is
6 Nyiesha Carrington. And Kim Hassler would also
7 probably know.
8 MR. VARGA: What was the last name,
9 Carrington?
10 A. C-A-R --
11 Q. C-A-R-R-I-N-G-T-O-N?
12 A. Yes.
13 Q. And is it your understanding,
14 Mr. Werner, that the rent checks that are being
15 paid in escrow, pursuant to the letter that is
16 Defendant's Exhibit F, continue to be paid in
17 escrow?
18 A. It's my understanding, yes. That's what
19 my direction was to my staff.
20 Q. Okay.
21 And do you know whether rent checks --
22 do you know whether a rental payment, defined
23 however you want to define it, was paid between
24 August of 2007 and November of 2007?
25 A. I don't -- I don't know for sure.

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1 Werner
2 I would have check my records.
3 Q. Who would know?
4 A. Our accounting department.
5 Q. Would be the same ladies that you just
6 gave us?
7 A. Yes.
8 Q. Nyiesha Carrington and Kim Hassler?
9 A. Yes.
10 Q. But without checking with them, your
11 testimony today, based on your understanding at
12 this time, is that rental payments are being paid
13 into escrow, and that the sales of Kolo -- Kolo
14 net sales in your shop-in-shop, are not yet to a
15 level requiring a payment of royalties. Is that
16 correct?
17 A. I don't know. I don't know. I have to
18 look at the sales. I don't know.
19 Q. You don't know whether the sales are yet
20 at 250.
21 A. That's correct.
22 Q. Okay. But when they get to 250, you're
23 going to pay royalties; is that your --
24 A. I would intend to pay it, yes.
25 Q. All right.

55 (Pages 214 to 217)

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Werner

A. 251 -- or 250, sorry. 250.

MR. VARGA: To be precise, 250,000.

A. \$250,000, right. Yes.

Q. Are there any other instances, Mr. Werner, where communication between Kolo and Kate's, since May of 2007, has in your mind modified the terms of Plaintiff's Exhibit 1?

A. No. Not that I can recall.

Q. Might there be some?

A. Of course there may. I don't recall any other discussion that we had that modified the agreement.

Q. Okay. Okay.

MR. VERSFELT: Let's go off the record.

(A recess was taken.)

Q. Mr. Werner, I finished my questioning of you at this time.

A. Thank you.

Q. Thank you.

MR. VARGA: Thank you. Let me just....

EXAMINATION BY MR. VARGA:

MR. VARGA: Why don't we mark this as Plaintiff's -- what was the last one, from yesterday?

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Werner

MR. VARGA: All right. So now that he has notice, are you willing to -- and if that's Kate's position, that they have no access, then are you requesting that Kolo provide access to that information? Because he's willing to do that.

MR. VERSFELT: Oh, absolutely. And I believe that Mr. Werner has already said he's willing to do that. I don't think there's any misunderstanding on that.

MR. VARGA: We just want to make sure that it's on the record, that to the extent it's Kate's position that they're willing to access information --

Q. And I don't know what you have to do to access that information. Is that like password protected?

A. I don't know what's the problem, to be honest with you. It was the first time yesterday, so it could be something in the system. So I don't know. I know my staff has been posting it inside the Internet. I don't know what's wrong with their user number, name and password, but I can certainly check.

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Werner

MR. VERSFELT: 9. Oops, no, here was a 10.

MR. VARGA: So it's going to be Plaintiff's 11 of today's date.

THE WITNESS: Can I talk to you for a second?

MR. VARGA: Sure.

(Discussion off the record.)

MR. VARGA: Mr. Werner has a very good point, that based on Mr. Flax's testimony yesterday, it appears to be an issue whether Kate's is no longer able to access, what is it, POS data.

So this is the first notice that he indicated today that it ever happened.

Q. Could you tell us if you ever received notice from Kate's --

A. No.

Q. Hold on, let me finish the question.

If you ever received from Kate's that they were not able to access the POS data?

A. No. That was the first time yesterday that I heard, from anyone, that they were unable to receive POS data.

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Werner

In good faith, I'm absolutely willing to do that.

I would also like to request a contact person to rely on certain requests from Kate's, because I understand from Lionel Flax yesterday, he no longer works for them.

MR. VARGA: So --

MR. VERSFELT: That's fair.

MR. VARGA: So I guess you will provide somebody's contract information to me, and then I'll relay it over to Mr. Werner.

MR. VERSFELT: I guess I will. I'll be happy to do that.

MR. VARGA: All right. Let me just address this. Let's mark this Plaintiff's 11.

(Lease between Kate's and Propeller Company, LLC, Bates-numbered KP 0089 through KP 0118, was marked Plaintiff's Exhibit 11 for identification, as of this date.)

Q. Mr. Werner, we have marked what is called Plaintiff's Exhibit 11 of today's date, which is -- we kept the numbers in continuous basis. We finished yesterday with Plaintiff's

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1 Werner
2 Exhibit 10, so we're using 11 today.
3 So this is just for the record, that we
4 have no ten other prior exhibits today that we
5 marked, as this is the first one.
6 I want you to take a look at Plaintiff's
7 Exhibit 11, and tell me if you recognize this
8 document.
9 MR. VARGA: Just for the record,
10 Plaintiff's Exhibit 11 is also marked KP 0089
11 through KP 0118.
12 A. Are you asking if I've ever seen that?
13 Q. Just take a look, and tell us if you
14 recognize this document in the first place.
15 A. I recognize it's a lease between Kate's
16 and Propeller Company, LLC. Yeah, I recognize it,
17 that it's a lease.
18 Q. Have you ever seen this before?
19 A. No.
20 Q. By the way, you should flip through it
21 just to make sure your statement is correct,
22 because you just looked at the first two pages.
23 A. Yeah. It's hard to read the print, the
24 small print, but yes.
25 Oh, actually --

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1 Werner
2 (The witness read.)
3 A. Okay.
4 Q. Is your answer still the same?
5 A. I have never seen that document.
6 Q. I represent to you that this document
7 was produced to us by Kate's Paperie's attorneys,
8 and that's why it contains the KP marking on it,
9 89 through 118.
10 MR. VERSFELT: And you need not be the
11 only one to make that representation. I
12 could make the same representation. We
13 produced it, sure.
14 Q. Now, I want you to take a look at
15 KP 0095, and can you tell me if there's indication
16 for -- you know, the -- what appears to be like an
17 annual rental rate for this particular lease.
18 That's Plaintiff's Exhibit 11.
19 A. Yes. The annual rental rates are stated
20 in Schedule A, starting in 12/1/05 through
21 11/30/2015, and it states an annual rental rate,
22 in dollars, starting with \$687,150, annual rate.
23 Rental rate. And then it states a monthly rate of
24 \$557,262.50 per month.
25 Q. Okay. So in this -- just to be clear,

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1 Werner
2 it says, commencing 12/01/2005 through 11/30/06,
3 the annual rental rate that you just read pertains
4 to that period, correct?
5 A. That's correct.
6 Q. And then in the following period, which
7 is 12/1/06 through 11/30/07, what is the annual
8 rental rate for that?
9 A. The annual rental rate is \$687,150.
10 687,150.
11 Per year. Annual rental rate.
12 Q. And a monthly?
13 A. And the monthly rate is \$57,262.50 per
14 month.
15 Q. Now, do you have an understanding of
16 approximately, or even if you don't, specifically,
17 how many square feet there are in Kate's Paperie
18 store at Spring Street location?
19 A. I think there's between -- my
20 understanding from speaking to Lionel, there was
21 between 5- and 6,000 square feet, something like
22 that.
23 Q. Okay. Now, if -- would you take the
24 calculator, please, and if you divide this total
25 that you mentioned, 687,150, by --

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1 Werner
2 A. 6,000 square feet.
3 Q. By 6,000 square feet?
4 A. Would be \$114 per square foot per year.
5 \$114.53, to be exact, per square foot per year.
6 Q. Per year. And that's not per month.
7 A. It is not per month.
8 MR. VERSFELT: Wait, what's not per
9 month?
10 MR. VARGA: The \$114.52, that's not a
11 per month rate, but it's a per year rate.
12 Q. Is that your testimony?
13 A. That's correct. That's my testimony.
14 Q. Would you have ever agreed to pay either
15 \$75 or \$140, per square foot, per month, for the
16 shop-in-shop arrangement?
17 A. Absolutely not.
18 Q. Why not?
19 A. Because there is no -- there's -- I
20 don't even think there's a market rent in the
21 world that's equal to that, on an annualized
22 basis.
23 Q. What do you mean by that?
24 A. What I mean is if you take \$75 per
25 square foot times 12 --

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Werner

1 Q. Let's do the math.

2 A. That would be \$900 annually, per square
3 foot, \$900 per square foot per year. I'm not even
4 sure there's a market in the world that has that
5 much.

6 Q. All right. Now, what was the size of
7 the space -- what is the size of the space that
8 Kolo has occupied, even currently, within Kate's
9 at Spring Street?

10 A. Approximately 450 square feet.

11 Q. How much is that, if you multiply that
12 with the 900?

13 A. That would be \$405,000.

14 Q. Per year?

15 A. Per year.

16 Q. For 450 square feet.

17 A. Yes.

18 Q. And how much is 450 square feet of the
19 total approximate 6,000 square feet, percentage
20 wise?

21 A. It's 7-1/2 percent.

22 MR. VERSFELT: Could you compute that
23 with 5,000 square feet, too?

24 MR. VARGA: Sure.

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Werner

1 Period.

2 Q. Thank you.

3 MR. VERSFELT: Okay.

4 EXAMINATION BY MR. VERSFELT:

5 MR. VERSFELT: Could I have the
6 calculator, please?

7 Q. How much would \$75 per square foot be,
8 per month, on your 450 square feet? Do you know?

9 I mean, could you do the math?

10 A. 75 -- approximately \$405,000.

11 Q. No. I didn't say per year. Per month.

12 MR. VARGA: Per month. He said per
13 month.

14 A. Sorry. \$33,750.

15 Q. Okay. Now, your lawyer, Mr. Werner, put
16 before you Plaintiff's Exhibit --

17 MR. VARGA: 11.

18 Q. -- 11. And he directed your attention
19 to the page within it, that is Bates-stamped
20 KP 0095.

21 And he had you read from that page
22 the -- what I think is a Schedule A. Could you
23 find that page for me? 0095.

24 Okay. And he had you read from the --

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Werner

1 THE WITNESS: It's 9 percent.

2 MR. VERSFELT: Okay.

3 Q. So in essence, would you have paid for
4 9 percent of the property, 400 -- what was it,
5 \$5,000? Would you have ever agreed to that, if
6 that was intended by parties?

7 A. Would I have paid --

8 MR. VERSFELT: Objection to form.

9 A. Would I have paid \$450,000 for 9 percent
10 of the total space? Absolutely not.

11 Q. Yeah. Okay.

12 A. No way.

13 Q. Was there a -- ever a discussion that --
14 that included something like that, that you would
15 pay upwards to \$450,000, or whatever the exact
16 amount is, per year, for 450 square feet space
17 within Kate's Paperie?

18 A. No, absolutely not.

19 Q. The -- was it your understanding, prior
20 to the execution of the LOI by Lionel Flax, that
21 they had no -- no such expectation of you, of
22 Kolo?

23 A. They had absolutely no expectation to
24 pay 70 -- \$75 per square foot per month, at all.

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Werner

1 several of the entries on that page, that are all
2 drafted to set forth an annual rental rate and a
3 rental per month. Correct?

4 A. That's correct.

5 Q. Each one of those entries says, annual
6 rental rate of a dollar amount, and so many
7 dollars per month. Right?

8 A. That's correct.

9 Q. Each of those entries makes absolutely
10 clear what dollars are annual dollars and what
11 dollars are monthly dollars, don't they?

12 A. They specifically say annual rate,
13 rental rate, in dollars, and they specifically say
14 monthly numbers per month.

15 Q. Right. They are -- and each of those
16 entries is explicit in defining the annual dollar
17 rate and the monthly dollar rate, correct?

18 A. I don't know about explicit. It states
19 it.

20 Q. It states it explicitly, doesn't it?

21 A. I don't know.

22 Q. Does it use the words "annual" and
23 "monthly" in every one of the ten entries on that
24 page?

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1 **Werner**
2 A. Actually, it's not consistent,
3 counselor.
4 **Q. Does it use the word "annual" and "per**
5 **month" in every entry on that page?**
6 A. In every entry, it states an annual
7 rental rate in dollars, and then it says, in
8 writing, and then it says, in dollars per month.
9 So it's not explicit in -- in its entirety.
10 **Q. Now, let's look at the Soho Proposal**
11 **Basic Terms page in the Addendum A of Plaintiff's**
12 **Exhibit 1, please.**
13 Now, direct your attention to
14 paragraph --
15 MR. VARGA: Not with this one. This
16 one. Basic terms?
17 **Q. Basic terms. Directing your attention**
18 **to paragraph 5. Does paragraph 5 say anything**
19 **about annual rent?**
20 A. No.
21 **Q. Okay. Does it speak explicitly of,**
22 **quote, monthly rental payments, end quote?**
23 A. It explicitly states that we will --
24 that Kolo will pay Kate's monthly rental payments.
25 **Q. Thank you. Now, could you turn the**

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1 **Werner**
2 **page. I would like to direct your attention to**
3 **the financial proposal page that follows the basic**
4 **terms page.**
5 In paragraph 1, where it says, "Starting
6 rent per square foot -- \$75." You see that?
7 A. Yes.
8 **Q. Does it say "annual rent"?**
9 A. No.
10 **Q. Now, let's look at paragraph 4, where it**
11 **says, "Rent increases," and has the schedule of**
12 **square footage payments for levels of net sales.**
13 My question to you, sir, is, anywhere in
14 that paragraph 4, does it say, annual rental rate?
15 A. It does not.
16 **Q. Okay. Thank you.**
17 MR. VARGA: All right, let me just
18 clarify something.
19 EXAMINATION BY MR. VARGA:
20 **Q. Paragraph 4, same page, the --**
21 **Plaintiff's 1 entitled Financial Proposal,**
22 **would -- would Kolo been -- would it have been**
23 **possible for Kolo to reach \$250,000 sales in one**
24 **month?**
25 A. No.

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1 **Werner**
2 **Q. How about \$350,000 in a month?**
3 A. Absolutely not.
4 **Q. How about \$450,000 a month?**
5 A. No.
6 **Q. How about \$550,000 a month?**
7 A. No.
8 **Q. How about \$650,000 a month?**
9 A. No.
10 **Q. How about \$750,000 a month?**
11 A. Absolutely not.
12 **Q. So why would these, in the column**
13 **indicating the net sales, and \$250,000 and 350-,**
14 **et cetera, tied with these increases in the square**
15 **footage?**
16 A. That was -- that was an annual number
17 for sales and per square foot.
18 **Q. And did the Flaxes understand this to be**
19 **on an annual basis or a monthly basis?**
20 A. Absolutely. Yes.
21 **Q. Which one?**
22 A. They -- they understood it to be annual.
23 **Q. Did they ever communicate to you, prior**
24 **to signing the LOI, that they had an expectation**
25 **that Kolo would reach, let's say at a minimum,**

Page 233

1 **Werner**
2 **\$250,000 each month?**
3 A. No.
4 MR. VERSFELT: I object to form.
5 A. No.
6 EXAMINATION BY MR. VERSFELT:
7 **Q. Mr. Werner, your counsel's questions**
8 **were just now phrased in terms of Kate's Paperie.**
9 **I want to ask you in terms of Lionel Flax. Right?**
10 What's the basis for your assertion that
11 Lionel Flax understood the numbers for rent in the
12 financial proposal to be annual numbers?
13 A. Rephrase that.
14 **Q. Okay. What is your basis for your**
15 **testimony asserting that Lionel Flax understood**
16 **the \$75 per square foot number on the financial**
17 **proposal page of Addendum A, as an annual number?**
18 A. With all the conversations that we've
19 had leading up to this, e-mails, e-mail
20 communication, he always indicated that he
21 understood that the annual sales numbers that were
22 in here also corresponded to the rent per square
23 foot per year.
24 **Q. And the e-mail that you're referring to**
25 **in your answer is the e-mail that we looked at**

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Page 236

1 Werner
2 today in August of 2007 --
3 A. No, that's not what I'm referring to.
4 Q. Do you have another e-mail?
5 A. Yes. There's a few of them, actually.
6 I think there's one in particular, I know of.
7 I would have to look through it.
8 It's the one that he -- Lionel refers to
9 this as being the benefits to Kolo when he's
10 speaking to his staff member. And he's --
11 MR. VARGA: I think we had that marked.
12 A. And he specifically says....
13 Q. Let's look at that.
14 MR. VARGA: We had that marked.
15 MR. VERSFELT: All the plaintiff's
16 exhibits are there.
17 MR. VARGA: Off the record.
18 (Discussion off the record.)
19 A. Lionel is explaining the benefits.
20 Essentially, they will pay 8 to 9 percent of our
21 rent in three of our stores, minimum.
22 MR. VARGA: Just for the record, we
23 didn't mark this yet, but we will mark it.
24 This is it?
25 THE WITNESS: That's one of them. I

1 Werner
2 Q. Let's finish this one, first. So I'm
3 handing you Plaintiff's 12. Can you tell me what
4 this is?
5 A. This is an e-mail that was sent from
6 Lionel to Zama, who is a staff member of Kate's,
7 whereby he describes the benefits and his
8 understanding of Kolo -- of what benefits Kolo
9 could contribute to Kate's.
10 Q. What's the date of this e-mail?
11 A. April 20, 2007. And he indicates,
12 starting with the first benefit, Essentially,
13 they, being Kolo, will pay 8 to 9 percent of our
14 rent in three of our stores, minimum.
15 Q. Do you -- what do you read that to mean?
16 A. I read that to mean that he expected the
17 rental rate to be 8 -- equal to the equivalent of
18 what he was paying his landlord per square foot
19 per year, where Kolo would pick up 8 to 9 percent
20 of that.
21 Q. And would this be consistent, if -- if,
22 let's say, he meant to -- whoever wrote the
23 e-mail, meant to say 8 to 9 percent monthly?
24 Would that be consistent with that, 8
25 to -- would that be consistent with -- having the

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Page 237

1 Werner
2 think there's others out there, but I can't
3 remember exactly which one.
4 MR. VARGA: This is my version. Doesn't
5 have the Bates stamp. So this is
6 Plaintiff's 12.
7 (E-mail dated April 20, 2007, from
8 Lionel to Zama was marked Plaintiff's Exhibit
9 12 for identification, as of this date.)
10 MR. VERSFELT: May I look at it? Thank
11 you.
12 MR. VARGA: It's in the first batch I
13 produced.
14 MR. VERSFELT: Oh, yeah, I know. I've
15 seen it.
16 MR. VARGA: Just to pinpoint the
17 location, I had produced four batches, and it
18 was in the first batch.
19 THE WITNESS: Can I see that?
20 MR. VARGA: Yeah, sure.
21 EXAMINATION BY MR. VARGA:
22 MR. VARGA: Okay. For the record, we
23 have marked Plaintiff's Exhibit 12 of today's
24 date, a four-page document.
25 A. Well, no.

1 Werner
2 \$75 would be consistent with 8 to 9 percent of the
3 rent?
4 A. Not per month.
5 Q. Monthly rent?
6 A. No, no.
7 Q. Okay.
8 A. It would not.
9 Q. Would it be consistent with their yearly
10 rent?
11 A. Yes. It would be consistent with their
12 yearly rent.
13 Q. Okay.
14 MR. VERSFELT: Are you passing the
15 witness?
16 MR. VARGA: Yeah. Go ahead.
17 EXAMINATION BY MR. VERSFELT:
18 Q. Mr. Werner, was the faxed message that
19 was contained in Plaintiff's Exhibit 12 sent to
20 you at the time?
21 MR. VARGA: E-mail. You said fax.
22 Q. I'm sorry, let me correct myself.
23 Was the e-mail message that's in
24 Plaintiff's Exhibit 12 sent to you at the time it
25 was generated?

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1 **Werner**
 2 A. I believe it -- I believe I received
 3 this, yes.
 4 **Q. It's -- could you find your e-mail**
 5 **address on there?**
 6 A. Yes. Actually, it was forwarded to me
 7 by Peter Dunn. So he must have received it and
 8 forwarded it to me.
 9 **Q. And when did Peter Dunn forward that?**
 10 A. Oh. January 16, 2008.
 11 **Q. Right, in connection with this**
 12 **litigation.**
 13 A. Yes, but let me -- excuse me, counsel.
 14 **Q. Surely, look it over, because my**
 15 **question to you is, did you ever see it before**
 16 **your preparation for your deposition.**
 17 A. Yes, I did see it, actually. I did see
 18 it. And I need to check my e-mail, because I
 19 remember seeing that, and I responded back, after
 20 he sent this to me, with another e-mail.
 21 **Q. You, Mr. Dunn?**
 22 A. No, Lionel Flax.
 23 **Q. Okay.**
 24 MR. VARGA: Hold on, so -- off the
 25 record.

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1 **Werner**
 2 MR. VERSFELT: Wait. Why is this off
 3 the record?
 4 MR. VARGA: All right.
 5 Off the record, let me just say
 6 something.
 7 (Discussion off the record.)
 8 **Q. Mr. Werner, do you know what the total**
 9 **rent paid by Kate's Paperie is for all of their**
 10 **stores in Manhattan?**
 11 A. Do I know?
 12 **Q. Yes, do you know?**
 13 A. No, I don't exactly know. No.
 14 **Q. Did you know then?**
 15 A. I had an idea, yes.
 16 **Q. Do you know -- did you know then that a**
 17 **calculation of \$33,000 per month is 9 percent of**
 18 **their total rent for all their stores?**
 19 A. Did I know then?
 20 **Q. Yes.**
 21 A. The answer is yes, I approximated that,
 22 yes.
 23 **Q. So \$33,000 --**
 24 A. Per year.
 25 **Q. Per month. Is their --**

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1 **Werner**
 2 A. No, not saying.
 3 **Q. Okay. Let me ask the question so we're**
 4 **both clear on it. Did you know what their monthly**
 5 **rent totaled for all of their stores?**
 6 A. Their monthly rent, no. I did not.
 7 **Q. All right.**
 8 MR. VERSFELT: I'm done.
 9 MR. VARGA: All right. We're done.
 10 MR. VERSFELT: Are we all done? We're
 11 done.
 12 (Discussion off the record.)
 13 MR. VARGA: We're back on the record.
 14 Just to reflect the off-the-record
 15 conversation concerning the production of
 16 these transcripts, both plaintiff's
 17 transcript and defendant's transcript,
 18 plaintiff agrees to produce the transcript of
 19 Mr. Lionel by --
 20 MR. VERSFELT: Mr. Lionel Flax.
 21 MR. VARGA: Mr. Lionel Flax, by
 22 8:00 p.m. tonight, so that I have time to get
 23 back to my office, because I --
 24 MR. VERSFELT: You just told me that
 25 your secretary is prepared to send it off to

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1 **Werner**
 2 me.
 3 MR. VARGA: Right. If she's going to
 4 get it by 5:00, so then by 6:00 p.m., as will
 5 counsel have the same option, by tomorrow, he
 6 will produce me a PDF version of the
 7 deposition transcript of today's deposition
 8 by 6:00 p.m.
 9 So again, to recap, plaintiff will
 10 produce Lionel Flax's deposition transcript
 11 by 6:00 p.m. today, and defendant will
 12 produce deposition transcript of Mr. Werner's
 13 deposition by 6:00 p.m. tomorrow, so that the
 14 parties can act on executing the transcript.
 15 Is that fair?
 16 MR. VERSFELT: That sounded right to me.
 17 MR. VARGA: Okay, great. Thank you.
 18 (Time noted: 4:46 p.m.)
 19
 20
 21
 22
 23
 24
 25

ACKNOWLEDGEMENT
STATE OF NEW YORK)
) Ss.:
COUNTY OF NEW YORK)

I, KEITH WERNER, hereby certify, I have read the transcript of my testimony taken under oath in my deposition of February 12, 2008; that the transcript is a true, complete and correct record of what was asked, answered and said during this deposition, and that the answers on the record as given by me are true and correct.

KEITH WERNER
Subscribed and sworn to
before me on this _____ day
of _____, 2008.

NOTARY PUBLIC

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CERTIFICATE

STATE OF NEW YORK)
) Ss.:
COUNTY OF NEW YORK)

I JEFFREY BENZ, a Certified Realtime Reporter, Registered Merit Reporter and Notary Public within and for the State of New York, do hereby certify:

That the witness whose examination is
hereinbefore set forth was duly sworn by me and
that this transcript of such examination is a true
record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of February, 2008.

JEFFREY BENZ, CRR, RMR

| | | | | |
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| 244:14 | 10th 91:3 94:14,15 | 1999 35:2,8 | 217:20,22 218:2,2 | 5,000 226:24 |
| 0044 81:21,22 82:12 | 94:16 95:13 98:10 | 2 | 250,000 180:21 | 5/10 85:14 103:24 |
| 82:16,19 100:23 | 10:10 1:14 | 2 30:19 94:3 95:8,17 | 181:2 183:25 | 104:23 |
| 244:16 | 10022-6030 2:10 | 95:22,22 96:3 | 184:24 185:7 | 5/6 103:24 104:23 |
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| 82:19 100:24 | 10601-1717 2:5 | | 189:17,21 194:11 | |
| 101:13 244:16 | | | | |

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| 5:00 241:4 | 72 136:24 148:3 | | | |
| 550 210:10 | 75 196:19 199:21 | | | |
| 57th 140:17 141:23 | 228:11 | | | |
| 149:14 150:2,3,6 | 750 205:2 | | | |
| 150:18 152:13 | 750,000 204:23 | | | |
| 599 2:9 | 205:14 | | | |
| 6 | 8 | | | |
| 6 50:7 62:10 71:8 | 8 30:18 50:7 80:14 | | | |
| 73:11 77:14 78:2 | 81:14 83:7 86:6 | | | |
| 78:8 79:24 81:3,9 | 92:5,8 98:5,6 | | | |
| 81:10 85:8 86:6,7 | 100:20,25 157:13 | | | |
| 86:19 87:7 88:6 | 157:16,21 158:2,4 | | | |
| 88:14 89:10,16 | 158:21 159:13,19 | | | |
| 91:10 92:5,8 | 160:21 164:7 | | | |
| 93:17 97:20,25 | 171:10,25 172:7 | | | |
| 98:16,17 99:8,21 | 234:20 236:13,17 | | | |
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| 164:23 171:3 | 8th 91:2 94:14 | | | |
| 177:25 178:4,7,9 | 8:00 240:22 | | | |
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| 180:24 181:17,22 | 80 244:14 | | | |
| 182:21 183:17 | 81 244:15 | | | |
| 188:7,9 194:12 | 82 12:13 | | | |
| 206:2,4 207:11,15 | 83 12:14,14 | | | |
| 212:11,19,21 | 84 12:14 | | | |
| 213:2,4,15 214:14 | 86 18:11 | | | |
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| 215:2,5,9,17 | 89 223:9 | | | |
| 6th 94:15,16 95:12 | | | | |
| 98:10,15 | 9 | | | |
| 6,000 224:21 225:2 | 9 50:7 51:9,13 62:9 | | | |
| 225:3 226:20 | 63:13,15,20 64:2 | | | |
| 6:00 241:4,8,11,13 | 64:3,4 65:17 | | | |
| 60 158:9 159:17 | 67:14,20 68:4 | | | |
| 60,000 215:2 | 87:3,25 94:3 | | | |
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| 171:20 | 227:2,5,10 234:20 | | | |
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| 687,150 224:10,25 | 9/13/62 8:24 | | | |
| 7 | 90 30:14 | | | |
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| 131:5,14,18 | | | | |
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| 193:10,11 | | | | |
| 7th 87:23 | | | | |
| 7-1/2 226:22 | | | | |
| 70 227:25 244:13 | | | | |

EXHIBIT I

ORIGINAL

1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
KOLO, LLC,

Plaintiff,

-against-

CASE NO:

07-CIV-10653

KATE'S PAPERIE, LTD,

Defendant.
-----X

February 11, 2008

10:17 a.m.

DEPOSITION of LIONEL FLAX, a witness on behalf
of the Defendant herein, taken pursuant to
Court order, and held at the offices of
Kirkpatrick & Lockhart Preston Gates Ellis, LLP,
599 Lexington Avenue, New York, New York, before
Mary T. Slavik, RPR, a Certified Court Reporter
and Notary Public of the State of New York.



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1 Q. Still the second page.

2 A. "Did you find it?"

3 Q. And that is dated May 10th, 2007?

4 A. Yes. Okay. I'm following you.

5 Q. Now, if you flip to the first page.

6 A. Okay. Exhibit 2, the first page with the
7 sticker, yes.

8 Q. If you look down three inches roughly from
9 the top, you will see it starts, message, Keith Werner
10 wrote, "Hi, Lionel, I did receive your faxed LOI," do
11 you have that?

12 A. Yes, that is what he wrote.

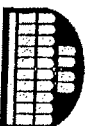
13 Q. Right. And now if you sent -- do you have
14 any doubt at this point now that you read that he
15 responded to you, yes, I did receive your faxed LOI,
16 at this point, do you have any doubt that you signed
17 any other document other than the LOI?

18 A. I don't see here that he specifically says, I
19 signed the LOI.

20 Q. Okay. But earlier, page two.

21 A. Okay.

22 Q. You say on May 9th, 2007, page two, "I just
23 sent this through signed," and you indicated to me
24 earlier that you sent it through via fax, through fax;



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1 correct?

2 A. Correct.

3 Q. And then he says on the first page, "that I
4 did receive your faxed LOI." At this point, now you
5 read this sentence or even now or when you read it
6 back whenever in May 2007 --

7 A. Yes.

8 Q. -- did you have any doubt that you signed
9 some other document other than the letter of intent?

10 A. Considering I never have seen a signed copy
11 of the letter of intent by both of us, I do have some
12 doubt, but it's very possible I could have sent him a
13 signed one.

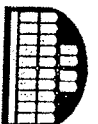
14 Q. Okay.

15 A. But if I did, it was a letter of intent. I
16 was simply acknowledging, if you will, his RFP or
17 request for proposal which was a way to begin the
18 discussions to enter into something later. So it is
19 possible.

20 Q. You mean like something later, a formal
21 agreement later; right?

22 A. Yeah.

23 Q. Okay. So, Mr. Werner states on page one,
24 5/12/07, so after he says, "I did receive your faxed



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1 LOI, thank you very much," then he says, "I will bring
2 the copy of the signed one to you on Tuesday."

3 Do you know if there was any kind of meeting
4 between you and Mr. Werner on whatever Tuesday he is
5 referring to?

6 A. On the Tuesday he was referring to Mr. Werner
7 was entertaining two very prominent business clients
8 of his from Japan. We were in the basement of a
9 crowded fancy restaurant. I believe I was running
10 late, and I do not recall him bringing or giving me a
11 signed copy of anything. He says here he intends to,
12 but I don't recall ever getting that. And, the fact
13 that he had two clients who had been successful with
14 the shop-in-shop model, indicated to me that he was
15 still selling and promoting the idea, and I didn't
16 receive a signed copy by both of us, no.

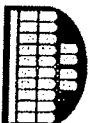
17 Q. But you attended that meeting on Tuesday that
18 he is referring to; correct?

19 A. I attended, yes, I was there, I met them for
20 lunch.

21 Q. And what was the location?

22 A. The Mercer Cafe or Mercury Cafe.

23 Q. Now, when you responded on the top of
24 Plaintiff's 2, "yes, we are making some progress, I



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1 think, can we meet at the MC at 1:30 p.m.," when you
2 say MC, is that the cafe you just mentioned earlier?

3 A. Yes, but what -- this is May 12, what
4 proceeds it, this might not even be the same strand.
5 I don't understand the question.

6 Q. My question is simply when you say in your
7 e-mail, can we meet at the MC at 1:30 p.m., right, you
8 wrote that?

9 A. Yes, that's right because he had previously
10 told me that, you know, we're going to have lunch with
11 the guys at the cafe, yes.

12 Q. And that is basically the message below, his
13 message dated May 12, 2007, where it says, "I thought
14 we could meet around 1 p.m. at the Mercer Cafe for
15 lunch if that is okay with you"?

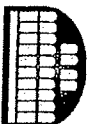
16 A. Yes.

17 Q. So you read that?

18 Q. And then you responded with the message above
19 that says, "can we meet at the MC at 1:30 p.m."

20 A. Correct.

21 Q. All right. Now, at that point when you
22 responded, "can we meet at the MC at 1:30 p.m.," by
23 the time you read that statement when he says, "I did
24 receive your faxed LOI," right?



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1 MR. VERSFELT: Can I have that question read
2 back?

3
4 (Requested question was read back by the
5 court reporter.)
6

7 A. The question is?

8 Q. The question is basically when you wrote in
9 response to Mr. Werner's e-mail, "can we meet at the
10 MC at 1:30 p.m.," by that time when you wrote this
11 message you already read his message below?

12 A. Yes, seemingly, but there is kind of a non
13 sequitur there.

14 Q. I understand, but apparently you're
15 responding to his meeting request?

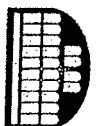
16 A. Yeah, I'm responding to his meeting request
17 and we meet.

18 Q. Do you have a recollection of reading when he
19 states, "I did receive your faxed LOI"?

20 A. Yes.

21 Q. And did you have any reason to question why
22 he wrote that?

23 In other words, did you have any reason to
24 question that he was referring to a document that you



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1 don't know about?

2 A. No, but, no.

3 Q. No question at all?

4 A. Well, it's not clear that I, a; signed it.

5 It's very possible in my busy world that I faxed it

6 and forgot to sign it. "I did receive your faxed

7 LOI," he is saying he received something, that is what

8 he is saying.

9 Q. Right. He doesn't say he received something,
10 he says, "I did receive your faxed LOI," he doesn't
11 say just something?

12 A. Okay. All right. Okay.

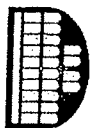
13 Q. Now, you said earlier that it's possible that
14 you signed something else. If that's possible, would
15 he have sent you that statement, "I did receive your
16 faxed LOI"?

17 A. I can't read his mind.

18 Q. But did you have any conversation with
19 Mr. Werner or anybody from KOLO after May 9th 2007
20 that you sent a wrong document to KOLO, that you sent
21 the wrong signed document to KOLO?

22 MR. VERSFELT: I object to the form. This
23 exhibit is what you refer to as the LOI.

24 MR. VARGA: Yeah.



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1 MR. VERSFELT: It's 12 pages long.

2 MR. VARGA: Yes.

3 MR. VERSFELT: Now, the issue here is not who
4 sent what e-mail to whom, but what was meant by
5 the term LOI in each of those e-mails. That's
6 the issue. So I think you're badgering the
7 witness trying to say, well, did you send this
8 e-mail after this e-mail. Of course the e-mail
9 record is clear, it's incomplete in this exhibit
10 but it's clear.

11 Q. But my question is different. My question is
12 after May 9th, 2007, did anybody from KOLO ever tell
13 you you sent them a wrong document signed?

14 A. Not that I can recall. I never saw a signed
15 copy by both parties of what Mr. Werner calls a draft
16 of a proposal and here it refers to as the LOI. I
17 have never seen that.

18 Q. You've never seen one signed by both parties?

19 A. Signed by myself or by him. It's clear that
20 I might have signed it, but I don't have it, and I
21 certainly don't have one that both of us signed, and
22 I've never seen one that both of us signed.

23 Q. Okay. That's fair.

24 MR. VARGA: Should we take a lunch break



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1 now?

2 MR. VERSFELT: Sure.

3

4 (A lunch break was had at 12:53 p.m.)

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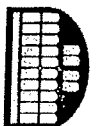
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1 A F T E R N O O N S E S S I O N

2

3 MR. VARGA: We're back on.

4

5 BY MR. VARGA:

6 Q. Mr. Flax, we're back on the record. We just
7 had our lunch; I just want to remind you that
8 you're still under oath --

9 A. Okay.

10 Q. -- as we continue with the deposition.

11 Before we were talking about the letter of
12 intent, the two pages, which are Plaintiff's 1.

13 MR. VERSFELT: For the record, the two pages
14 are the first two pages of Plaintiff's 1.

15 MR. VARGA: That's what I said.

16 A. The LOI is the first two pages; right?

17 Q. Yes, we made that clear on the record.

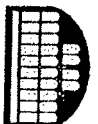
18 Now, do you remember when you received these
19 two pages, the letter of intent, Plaintiff's 1?

20 A. Haven't we gone over that?

21 Q. I don't know, did I ask that?

22 MR. VERSFELT: Yes, but I have no problem
23 with him answering again to get us going.

24 A. Ready?



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1 Q. Yes.

2 A. My recollection is that I received the LOI at
3 either the end of April or beginning of May.

4 Q. I apologize, I did ask that.

5 That was hand-delivered by Mr. Werner;
6 correct?

7 A. Yes.

8 Q. From the time you received it up until June
9 1st, 2007, did you at any time indicate your
10 dissatisfaction with any of the terms contained
11 therein to Mr. Werner or anybody at KOLO?

12 A. We never got into any formal or informal
13 conversations that continue -- that would continue
14 moving towards an agreement. So I do not believe I
15 did.

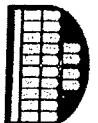
16 Q. So there were no counterproposals to any of
17 the terms that were set forth in the two pages of the
18 LOI in Plaintiff's 1; correct?

19 A. There was never a follow-up discussion about
20 taking what the LOI stated and to turn it into a
21 formal agreement.

22 Q. That is not what I asked.

23 A. Okay. Can you please repeat the question?

24 Q. I understand what you're saying so far that



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1 you intend to -- actually Kate's intended to have a
2 formal agreement later on. What I'm focusing on right
3 now is these two pages, and my question is specific.

4 At any time between late April I believe or
5 early May, whenever you received it, up until June 1st,
6 2007, did you ever say to Mr. Werner or anybody else
7 from KOLO that you're not in agreement with any of the
8 proposed terms therein?

9 A. No.

10 Q. Did there come a time that KOLO moved into
11 the Spring Street location?

12 A. Yes.

13 Q. When did that happen?

14 A. That happened, I believe, around Memorial Day
15 weekend and the time leading up to June 1st.

16 Q. Would it be one week or more before June 1st
17 2007, that KOLO moved in roughly?

18 A. Roughly more.

19 Q. More than one week?

20 A. Two weeks, I would say roughly.

21 Q. Okay. Did KOLO open a store so it was fully
22 functional at the Spring Street location beginning

23 June 1st, 2007?

24 A. The store was functional except for the fact

